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Supreme Court, U.S.
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No. 10-872

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In the

Supreme Court of the United States

SHAWN FREEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals err in finding that, although the District Court abused its discretion in refusing to grant Defendant's challenges for cause as to admittedly biased jurors, such abuse was harmless?

Did the Court of Appeals err in affirming the District Court's refusal to allow cross examination as to the magnitude of the sentence reduction offered to a cooperating witness when such witness was the sole witness to establish the alleged conspiracy and his credibility was, therefore, a material issue for the jury's determination?

Did the Court of Appeals err in holding that a clearly established constitutional right existed so as to support convictions for conspiracy to violate civil rights and violation of civil rights where there was no evidence of any longstanding, pervasive or well-documented history of inmate assaults at the Grant County Detention Center prior to the incidents described in the indictment?

Did the Court of Appeals err in holding that sufficient evidence existed to prove that Shawn Freeman joined a conspiracy to violate civil rights where he took no part in the decision to place a pretrial detainee in general population, that he did not place the detainee in a general population cell, and that, at most, he was present when another guard spoke to inmates about the detainee?

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The decision of the Court of Appeals is not reported, but is reproduced in the Appendix herein at pp. 1a to 29a. The decision of the United States District Court for the Eastern District of Kentucky is not reported, but is reproduced in the Appendix at pp. 32a to 40a.

BASIS FOR JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231. The Court entered final judgment against Shawn Freeman on December 10, 2008. Freeman appealed and the United States Court of Appeals for the Sixth Circuit affirmed Freeman's convictions on August 24, 2010. Freeman filed a Petition for Rehearing, which was denied on September 28, 2010. The Court of Appeals denied the Government's Petition for Rehearing as to its cross appeal on December 17, 2010. Freeman now asks this Court to exercise jurisdiction, pursuant to his Petition for Writ of Certiorari, filed pursuant to S. Ct. R. 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions involved in this case, U.S. Const. amend. VI, 18 U.S.C. § 241 and 18 U.S.C. § 242, are reproduced in Appendix D.

STATEMENT OF CASE

1. Summary of Facts

On February 13, 2003, Joshua Sester, an 18 year old, was arrested by Scott Allen of the Pendleton County, Kentucky, Sheriff's Department. (Tr. Vol. 2B pp. 31, 49-50). Deputy Allen transported Sester to the Grant County Detention Center ("GCDC"). (Tr. Vol. 1C, p. 50). Clinton Shawn Sydnor, the deputy in charge, decided to place Sester in general population. (Tr. Vol. 2A, p. 102). No GCDC policy or procedure prevented placement of a pretrial detainee in general population. (Tr. Vol. 2A, pp. 33, 50, 51-52, 59; Tr. Vol. 2B, pp. 130-132).

Sester was assaulted by inmates in Cell 101, where he was placed by Sydnor and fellow deputy Jack Powell. (Tr. Vol. 2A, p. 6). This appeal concerns whether Shawn Freeman should be criminally responsible for this assault. Freeman did not make the decision to place Sester in general population; did not place Sester in Cell 101; had no discussion with the inmates in Cell 101; and was not present at the GCDC when Sester was assaulted.

2. Sester's Arrival at the Grant County Detention Center.

Upon arrival, Deputy Allen spoke with Sydnor about Sester. (Tr. Vol. 1C, pp. 50-51). Sydnor has offered many conflicting versions of what Deputy Allen said. (Tr. Vol. 2A, pp. 30-32). Before the Grant County Grand Jury and in a deposition, Sydnor testified that Allen reported Sester had tried to run over another officer and needed to be "taught a lesson."

(Tr. Vol. 2A, pp. 30, 32). After reaching his plea agreement, Sydnor claimed Allen gave no such instruction that he (Sydnor) had lied in prior testimony, and that Sydnor wanted Sester to be taught a lesson. (Tr. Vol. 1C, pp. 50-51, 56; Tr. Vol. 2A, pp. 7-8).

Upon Sester's arrival, Sydnor called the other deputies to the booking area to see Sester. (Tr. Vol. 1C, p. 53; Tr. Vol. 2A, pp. 122-23). Sydnor mocked Sester's bleached hair and boxer shorts adorned with hearts. (Tr. Vol. 1C, p. 54). Sydnor claimed Sester looked like a girl and a sissy. (Tr. Vol. 1C, p. 54)

Deputy Powell commented it was not smart to wear boxer shorts with hearts on Valentine's Day. (Tr. Vol. 2B, p. 118). At that time, Powell and Sester were in booking, away from where Deputy Freeman and others were congregating. (Tr. Vol. 2B, pp. 116-117, 118). Deputies tended to congregate every night in the room next to the booking area. (Tr. Vol. 2B, p. 116). Freeman never saw Sester's boxer shorts. There was no evidence Freeman teased Sester. Nor was there any evidence Freeman overheard Powell's comment about wearing boxer shorts with hearts on Valentine's Day.

3. Sydnor's Decision to Place Sester in General Population.

Sydnor told Lanham that Sester needed to be taught a lesson. (Tr. Vol. 1C, p. 55). Sydnor claimed Freeman was present when he made this comment, about five feet away. (Tr. Vol. 1C, p. 57). Sydnor did not claim Freeman was present in his prior statements or testimony. (Tr. Vol. 2A, p. 66). He never mentioned this "fact" prior to his plea agreement. (Tr. Vol. 2A, p.

66). Freeman made no comments or gestures in response to Sydnor's comment. Sydnor wanted someone to talk to Sester so he would not return to jail. (Tr. Vol. 2A, p. 53). Lanham, likewise, testified Sydnor wanted Lanham to talk to inmate Bobby Wright so Wright could tell Sester jail was no place to be. (Tr. Vol. 3A, p. 93).

Sydnor and Lanham gave conflicting versions concerning what transpired next. Neither version implicated any involvement by Freeman. They both testified Sydnor decided to place Sester in general population. (Tr. Vol. 1C, p. 58; Tr. Vol. 3A, p. 90). Lanham testified Sydnor said that Cell 101 had a vacancy and Lanham commented he knew an inmate in Cell 101, Bobby Wright. (Tr. Vol. 3A, pp. 92-93). Lanham thought Wright would explain to Sester that he (Sester) did not want to return to jail. (Tr. Vol. 3A, pp. 92-94).

In February 2003, Lanham and Freeman were working in the "Class D" area, a non-secured area for non-violent offenders. (Tr. Vol. 3A p. 83; Tr. Vol. 3B, p. 50). These inmates were permitted to leave during the day, work in the community, and return to the GCDC at night. (Tr. Vol. 1C, pp. 27-28). Bobby Wright had committed no violent offenses, but had committed drug offenses. (Tr. Vol. 3B, p. 63). Wright had been relocated from Class D to general population after being caught with marijuana. (Tr. Vol. 3B, pp. 65-66).

4. Lanham and Freeman head down Hall 26.

Following his discussion with Sydnor, Lanham told Freeman they needed to go down Hall 26, where Cell

101 was located. (Tr. Vol. 3B, p. 53). Lanham never explained why he was going down Hall 26. (Tr. Vol. 3B, p. 39). Lanham and Freeman testified Lanham went to Cell 101 and talked to Wright. (Tr. Vol. 3B, p. 39). Lanham veered toward Cell 101 to talk to Bobby Wright while Freeman went to speak with an inmate in a different cell. (Tr. Vol. 3B, pp. 39-40; Tr. Vol. 3B, pp. 53-54). William Chandler testified the jail video showed Lanham at Cell 101 with Freeman going the opposite direction (Tr. of 12/8/08, p. 7-8). Chandler testified Freeman never went near Cell 101. (Tr. of 12/8/08, p. 9).

Bobby Wright gave a different story. Inmate Wright testified Lanham and Freeman both went to Cell 101. (Tr. Vol. 2B, pp. 73-76). Wright claimed Lanham told Wright to "fuck with" Sester. (Tr. Vol. 2B, pp. 93-100). Wright claimed Freeman made no comment, but nodded his head as if in agreement. (Tr. Vol. 2B, p. 101). Wright did not view Lanham's comment as striking, believing the inmates would "joke" with Sester. (Tr. Vol. 2B, p. 78). Wright was "shocked" when inmates began to assault Sester. (Tr. Vol. 2B, p. 85).

Bobby Wright's trial testimony contradicted Wright's earlier testimony. Wright's various stories are as follows:

> 1. When interviewed at the jail, Wright asserted the guards who said Sester was being brought to Cell 101 were Lanham and Sydnor, not Freeman. (Tr. Vol. 2B, p. 97).
>
> 2. Before the Grant County Grand Jury, Wright testified Freeman said they wanted

the inmates to "fuck with" Sester. (Grant County Grand Jury Testimony, p. 7).

3. Before the Federal Grand Jury, he could not remember Freeman until the prosecution asked "Does the name Freeman ring a bell?" (Tr. Vol. 2B, pp. 90-99).

4. After this prompting, Wright asserted Lanham said "fuck with him." (Tr. Vol. 2B, p. 100).

5. Before the Federal Grand Jury, Wright admitted "it's been so long now... I can't really say" who said "fuck with him." (Federal Grand Jury Testimony, p. 10). Wright then changed again, asserting that "Freeman...made the fuck with him comment..." (*Id.*, p. 12).

6. At trial, he claimed Lanham said "fuck with him" and Freeman nodded. (Tr. Vol. 2B, p. 100).

5. Sydnor and Powell escort Sester to Cell 101.

Lanham and Freeman left Hall 26 and returned to Class D. (Tr. Vol. 3B, p. 42; Tr. Vol. 2A, p. 54). Sydnor then removed Sester from his holding cell. (Tr. Vol. 2A, p. 6). He and Powell then escorted Sester down Hall 26. (Tr. Vol. 2A, p. 6).

As Sydnor was pushing Sester into Cell 101, the inmates hollered comments, such as "Happy Valentine's Day." (Tr. Vol. 2A, p. 6). Nontheless,

Sydnor and Powell placed Sester in Cell 101. (Tr. Vol. 2A, p. 54.) Shortly after Sester's arrival in Cell 101, Alex Castillo, an inmate, asked Sester if he knew John Canafax. (Tr. Vol. 2B, pp. 54-55). Sester did and commented that Canafax and thought Canafax was a bully. (Tr. Vol. 2B, p. 55). Castillo then revealed Canafax was his step brother. (Tr. Vol. 2B, p. 55).

The inmates, including Castillo, then began assaulting Sester. (Tr. Vol. 2A, p. 42). He was forced to perform oral sex on inmate Victor Zipp. (Tr. Vol. 2A, p. 42). Bobby Wright told Zipp to stop and no one bothered Sester thereafter. (Tr. Vol. 2A, p. 83).

Before the assault, Freeman left the jail. (Tr. Vol. 2A, p. 12). Deputy Wendy Guthrie had a seizure. (Tr. Vol. 2A, p. 12). Freeman was alerted because Freeman was an EMT. (Tr. Vol. 2B, pp. 7-9). Freeman went to the control room to assist Guthrie. (Tr. Vol. 3B, p. 56). Freeman assessed her condition and determined she should go home. (Tr. Vol. 3B, p. 56). A couple of jailers helped Guthrie to Freeman's truck and Freeman took her home. (Tr. Vol. 3B, p. 56).

6. The Investigation.

The next morning, Sester informed a jailer what had happened. (Tr. Vol. 3A, p. 31). He then spoke with Sandy Cook, a nurse employed by GCDC. (Tr. Vol. 3A, p. 32). Cook did not perform a physical. The jail did not have a rape kit, as there had never been a rape at GCDC. (Tr. Vol. 3A, pp. 32-33).

Sester's father confronted the jailer, Steve Kellam. (Tr. Vol. 1C, p. 9). Kellam said the incident had been reported to the Kentucky State Police. (Tr. Vol. 1C, p.

9). The Police investigated, but did not interview Freeman.

The case was presented to the Grant County Grand Jury, which heard testimony from several deputy jailers. Freeman was not asked to testify. The Grand Jury indicted the inmates who assaulted Sester, but issued no indictments against the jailers.

Sester sued the GCDC and several jailers, including Sydnor. Sester did not name Freeman. (Tr. Vol. 2B, p. 56).

Freeman's only involvement with the investigation concerned a statement written a few days after February 14, 2003. Freeman stated:

> On Friday Feb. 14 early in the morning, Dep. Lanham and my self were in booking when we left booking en route back to Class D we went to 26 Hall did a secure check for Sgt. Sydnor while we were down there Dep. Lanham had talked to Bobby Wright. I had spoken to one or two gentlemen in 99 and 99 about where the gentleman in D102 had been taken. When we were done with above subjects we returned to Class D. (Government Exhibit 4).

SUMMARY OF ARGUMENT

If the Government's evidence is believed, Shawn Freeman is serving fourteen (14) years in prison because he teased Joshua Sester about his appearance and nodded his head when another guard (Lanham) told an inmate (Wright) to "fuck with" Sester. Sydnor, the deputy in charge, instructed Lanham to talk to

Sester, so Sester would not get in trouble again and return to jail. Lanham spoke with prisoner Wright, a non-violent offender. Wright believed the inmates would "joke" with Sester and was "shocked" when inmates assaulted Sester. From Lanham's innocuous statement and Freeman's alleged nod, the jury convicted Freeman of a conspiracy to violate Sester's civil rights; violating his civil rights; and falsifying a statement.

Freeman's rights were denied during voir dire. The Court denied challenges for cause as to two (2) jurors who said they could not be fair (Nos. 56 and 143) and granted the Government's challenge for cause as to a juror (No. 88) who testified she would decide the case on the evidence. The Court of Appeals correctly held the District Court abused its discretion in denying challenges for cause as to Juror Nos. 56 and 143. The Court of Appeals, nonetheless, held this abuse was harmless because Freeman utilized peremptory challenges to strike these two jurors. While this Court held in *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000) that it was possible to find harmless error under such facts, this Court also cautioned that a trial court's deliberate misapplication of the law to force the use of peremptory challenges to cure an erroneous denial of a proper challenge for cause might warrant reversal. This Court has never been called upon to answer when a "deliberate misapplication of the law" might be found. This case affords this Court an opportunity to delineate the scope of *Martinez-Salazar* and its interplay between the "harmless error" and "deliberate misapplication" language.

The Court also denied a fair trial by unreasonably limiting cross examination of Sydnor, barring

questioning about the magnitude of the sentence reduction Sydnor sought. Under the original Indictment, Sydnor was facing a base offense level of 27 under § 2H1.1 (a)(1) and §2A3.1 of the 2002 advisory United States Sentencing Guidelines. (PSR at ¶ 30). Sydnor was facing an additional two-level increase under U.S.S.G. § 2A3.1 (b)(3) because the victim was in his custody, care, or supervisory control. (PSR at ¶ 31). Sydnor was also facing another six-level increase under § 2H1.1 (b)(1)(B) because the offense was committed under color of law. Furthermore, Sydnor was facing *at least* a two-level enhancement under § 3B1.1 (c) for being an organizer or supervisor in the criminal activity. (PSR at p. 18, stating that even with cooperation, Sydnor received a 2 level enhancement). Thus, assuming Sydnor had no criminal history, like Freeman, Sydnor's offense level would have been *at least* a level 37 and his advisory guideline range in this case would have been *at least* 210-262 months, or 17.5 to 21.83 years![1] The Court of Appeals' decision to uphold the prohibition on delving into this area of inquiry is in conflict with decisions from other appellate circuits. *United States v. Eagle*, 867 F.2d 436 (8th Cir. 1989); *Campbell v. Reed*, 594 F.2d 4, 7 (4th Cir. 1979); *United States v. Chandler*, 326 F.3d 210, 222 (3rd Cir. 2003).

Finally, there is no evidence Freeman joined a conspiracy. The evidence, at worst, established Freeman knew Sydnor intended to place Sester in

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[1] Sydnor ultimately received a substantial assistance reduction of 50% in exchange for his testimony resulting in a sentence of only 7.5 years. *See United States v Sydnor*, U.S. District Court, Eastern District of Kentucky, Case No. 2:08-cr-54-DCR (sentence of 90 months).

general population, which violated no policy, and overheard Lanham's conversation with prisoner Wright. This does not establish that Freeman joined a conspiracy. Nor did the evidence establish an intent to violate Sester's clearly established Constitutional rights. While a pretrial detainee's right to be free from punishment exists, the contours of that right are not so clearly established, nor so clearly applicable to these facts, that a reasonable person would know it applied here. While telling an inmate to "fuck with" another – to avoid future unlawful conduct – may have been unwise, the conduct was not undertaken with specific intent to violate the detainee's rights.

REASONS FOR ALLOWING THE WRIT

1. The District Court's abuse of discretion during voir dire presents this Court with an opportunity to clarify when a deliberate misapplication of the law has taken place and when denial of challenges for cause should not be considered harmless error.

This case had received considerable publicity, including an article in the *Cincinnati Enquirer* the morning of jury selection. Two of the jurors expressed strong opinions regarding guilt. Juror 56 testified:

> The Court: Do you feel like that as a juror, if you're seated, that you could put aside anything that you've read and you could assure me that you could base your decision only on what you see and hear in this courtroom?

> Juror No. 56: I certainly would do my best to make sure that that happens.
>
> The Court: Do you feel you would have a hard time doing that?
>
> Juror No. 56: It's a pretty graphic case, though.
>
> (Tr. Vol. 1-A, pp. 6-22)

Juror 56 could not promise to lay aside preconceived opinions:

> Juror No. 56: I would do the best that I can to be fair and impartial to both sides. I don't have any – I haven't completely made up my mind, but *based on what I've read, it's pretty made up*. (*Id.*, p. 24).

Being fair and impartial would "be a challenge." (*Id.*, p. 25). He said:

> Juror No. 56: *I'm not going to be totally neutral, no, sir.*
>
> ...
>
> *...I'm obviously not totally neutral.* But I can certainly try. (Tr. Vol. 1A, p. 27).

The Court denied the challenge for cause as to Juror 56. (*Id.*, pp. 120-21). The defense removed Juror No. 56 with a peremptory challenge.

Similarly, Juror No. 143 indicated strong opinions, testifying:

> Juror No. 143: Well, you know, I have an opinion. What degree of opinion, it's kind of hard to explain. It's hard not to read material like that without...making a judgment. On the other hand, I do believe I could make my judgment here based on what's presented. I really can't answer your question yes or no, it's a degree. (p. 38).
>
> I would, you know, do my darndest to do that. It's kind of a question, though, you can't really answer definitively. (*Id.*, at 39).

When pressed by counsel about whether he could be impartial, the juror responded, "[I]t's kind of an unanswerable question, that's the best judgment I have at this point. I think I can. ...I'm a human being and you don't, like the Judge says, erase things. I think I can do it, but that's the best assurance I can give." (*Id.* at 42).

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719 (1992). A defendant has the right to a jury panel untainted by Constitutional error. In *Wolfe v. Brigano*, 232 F.3d 499 (6th Cir. 2000), the Court held that the denial of challenges for cause violated Defendant's Sixth Amendment right to an impartial jury. One juror doubted their ability to put aside news reports. The Court of Appeals held the trial court unreasonably denied challenges for cause because the jurors did not state "unequivocally" they could set aside prior knowledge of the case. *Id.*, at 502. The Court cautioned about trying to elicit that the juror would be fair and impartial, noting that a refusal to excuse a juror for cause will not be upheld "simply

because the Court ultimately elicits from the prospective juror a promise that he will be fair and impartial." *Id.*, at 502. The Court of Appeals correctly held that the District Court abused its discretion in denying challenges for cause as to Jurors 56 and 143. The Court of Appeals erred, however, in finding harmless error because these jurors were excused with peremptory challenges.

The ability to exercise peremptory challenges is "one of the most important rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). In *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000), this Court held that where a biased juror is removed through a peremptory challenge, the failure to grant a challenge for cause may be harmless error. This Court also noted a trial court's deliberate misapplication of the law to force the use of peremptory challenges to cure an erroneous denial of a proper challenge for cause might warrant reversal.

Juror 88 asserted she would decide the case on the evidence. Despite her unequivocal assurances, the Court granted the Government's challenge for cause, believing her employment at Defense Counsel's prior firm disqualified her. However, even current employment does not disqualify a juror. *Nathan v. Boeing Corp.*, 116 F.3d 422, 425 (9th Cir. 1997). The District Court applied a different standard for the defense challenges than for the Government's challenge. All of the Government's challenges for cause were granted. (R. 90, Voir Dire, at 1190-131 (Jurors 96, 174, 139, 184, and 88). These disparate standards evidence the District Court's misapplication of the law and mandate reversal under *Martinez-Salazar*.

Indeed, if the conduct of the District Court here is not adequate to trigger the "deliberate misapplication of the law" language set forth in *Martinez-Salazar*, no case will present a sufficient basis for so doing. The ruling here, in effect, forces counsel to choose between allowing biased jurors to remain on the panel or using peremptory challenges to remove them. If counsel uses the peremptory challenge, he has deprived his client of a potential issue for appeal, as the harmless error formulation of *Martinez-Salazar* will be invoked to justify affirmance. If, however, counsel declines to use the peremptory challenge, he has preserved a valuable issue for appeal, yet assured his client's conviction. Such a choice mandates that counsel act ineffectively to preserve an error for review on appeal. Plainly, a rule which encourages counsel to disserve his client so blatantly is wrong. The other alternative, though, is to exercise the peremptory challenge, as any responsible attorney would do. In that instance, however, the District Court is authorized to trample over the Defendant's right to an impartial panel and such abuse will have no repercussions. The net effect of this ruling is to minimize the Defendants' use of peremptory challenges while maximizing those available to the Government.

The refusal to strike Jurors 56 and 143, coupled with striking Juror 88, slanted the panel in favor of the prosecution. The District Court's discretion concerning voir dire, is "subject to the essential demands of fairness." *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001). The Court below failed to satisfy those demands by employing one standard for the Government and a more difficult standard for the defense. Due process demands a level playing field,

which the District Court denied to Shawn Freeman, requiring reversal.

2. The Court of Appeals' decision, which affirmed the District Court's prohibition against cross examination of Clinton Shawn Sydnor as to the magnitude of the sentence reduction received as a result of his plea agreement, is in conflict with decisions from other appellate circuits.

The District Court erred in refusing to permit counsel to explore Sydnor's bias and motive for testifying. The Court prohibited counsel from asking questions regarding the *magnitude* of the sentence reduction Sydnor believed he would earn for his testimony. Because Sydnor was the key government witness, the Court's curtailment of Freeman's cross-examination "must be more carefully scrutinized." *Dorsey v. Parke*, 872 F.2d 163, 166 (6th Cir. 1989); *see also, United States v. Tracey*, 675 F.2d 433, 438 (1st Cir.1982) ("Especially where the witness is an accomplice of the defendant or may have some other substantial reason to cooperate with the government, the defendant should be permitted wide latitude in the search for the witness' bias.").

Prior to *voir dire*, the District Court asked counsel if there were additional matters to disucss. (Tr. Vol. 1A, p. 7). The Government asked the Court to limit cross examination of Shawn Sydnor "so as to not inform the jury anything about potential punishments..." (*Id.* at 7). The Court responded:

> ...[it] is improper for questions to be asked about potential punishment. The punishment

> or the penalty is within the exclusive province of the jury [sic], and therefore, it would be improper to ask questions about that ...Of course, it's proper to ask if a witness anticipates that he'll receive a lesser penalty as a result of entering a plea of guilty... It's not anything for the jury to be concerned about, ...I would anticipate that the parties would be able to certainly ask questions about the defendant entering a plea of guilty in exchange for hoping to receive a lesser punishment, if it goes much beyond that, it may become objectionable.

(*Id.* at 7-8). During trial, the Court stated, "Counsel has been warned about the limits in terms of the potential penalties that might be imposed by this Court, and I fully intend to hold counsel's feet to the fire with respect to that previous instruction." (Tr. Vol. 1A, p. 60).

The Sixth Amendment guarantees the right of an accused "to be confronted with the witnesses against him." The Supreme Court has recognized "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986), *citing, Davis v. Alaska* 415 U.S. 308, 315 (1974). While a trial judge retains discretion in imposing *reasonable* limits on cross-examination, it may not significantly inhibit a defendant's exercise of his constitutional right to confront witnesses. A court must determine whether "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense] counsel been permitted to pursue his

proposed line of cross examination." *Delaware*, 475 U.S. at 680.

Sydnor was the Government's "star" witness. Sydnor was the only witness who testified Freeman taunted Sester and Sydnor was the only witness who testified Freeman was present when Sydnor told Lanham to talk to an inmate about Sester. Sydnor's testimony was instrumental in Freeman's conviction. This is evident from the enormous benefit that he received in exchange for his testimony.

Sydnor pleaded guilty to one count of Conspiracy to Commit an Offense Against the United States, 18 U.S.C. § 371, and one count of Deprivation of Rights under Color of Law, 18 U.S.C. § 242. (PSR at ¶ 5); The Indictment against Sydnor was dismissed. (R. 115, Order Dismissing Indictment).

The Indictment alleged the acts committed by Sydnor, Lanham, and Freeman in furtherance of the conspiracy "included aggravated sexual abuse." (R. 1 at p.2). By dismissing the Indictment and allowing Sydnor to plead to a conspiracy under § 371 instead of § 241, and excluding aggravated sexual abuse, the maximum term Sydnor faced was only 15 years, as opposed a maximum of life.

Under the original Indictment, Sydnor's base offense level was 27 under § 2H1.1 (a)(1) and §2A3.1 of the 2002 advisory United States Sentencing Guidelines. (PSR at ¶ 30). Sydnor faced an additional two-level increase under U.S.S.G. § 2A3.1 (b)(3) because the victim was in his custody, care, or supervisory control. (PSR at ¶ 31). Sydnor faced an additional six-level increase under § 2H1.1 (b)(1)(B)

because the offense was committed under the color of law. Furthermore, Sydnor was facing *at least* a two-level enhancement under § 3B1.1 (c) for being an organizer or supervisor in the criminal activity. (PSR at p. 18, stating that even with cooperation, Sydnor received a 2 level enhancement). Even with no criminal history Sydnor's offense level would have been *at least* a level 37 and his advisory guideline range in this case would have been *at least* 210-262 months, or 17.5 to 21.83 years!

The plea agreement limited Sydnor's exposure to 15 years and gave him the potential of a 50 % substantial assistance reduction. By pleading guilty and assisting the Government in convicting Freeman, Sydnor was guaranteed no more than 15 years. While trial counsel questioned Sydnor about his desire for a reduced sentence as a result of his cooperation, counsel was constrained, due to the District Court's admonitions, from probing the extent of the benefit Sydnor hoped to garner. However, there was no other way to effectively cross examine Sydnor about the enormous benefit he was receiving than to explore the fact he pled to an Information, rather than the Indictment, which limited his maximum exposure to 15 years, rather than life.

"A criminal defendant 'states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of a witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *United States v. Chandler*, 326 F.3d 210, 222 (3rd Cir. 2003), *quoting Van Arsdall*,

475 U.S. at 680. The Eighth Circuit Court of Appeals discussed the necessity of cross examining a cooperating witness about such a significant benefit under similar circumstances. In *United States v. Eagle*, 867 F.2d 436 (8th Cir. 1989), the Court held that it would be appropriate to question a cooperating witness about the fact that she "pleaded guilty to voluntary manslaughter which she had to know carried a maximum sentence of 10 years in contrast to the potential lifetime sentence." *Id.*, at 443. The Court therein held:

> When the stakes are so high and the credibility of the one time associate in crime is acutely involved, the accused is entitled *as a matter of right* to effective cross examination. This includes not only the specific crime to which the co-actor is pleading guilty, but the range of punishment to which the one pleading guilty is exposed to in contrast to what a person knows – or ought to know – is the potential sentence following a plea of not guilty.

Id. (Emphasis added).

The Court in *Eagle* found it extremely important for the jury to know that a person was testifying against the defendant in order to save himself or herself from years up to life and to ensure a maximum of 10 years in prison. *Id.* The Court went on to say:

> The details of a plea can be highly relevant to a jury in assessing the credibility of the guilty pleading co-defendant who is taking the stand to testify for the prosecution. This is especially true if that witness has not yet been sentenced

> as there is a continuing incentive to give testimony that strengthens the prosecution's case.

Id., citing, Campbell v. Reed, 594 F.2d 4, 7 (4th Cir. 1979).

If the jury had learned the magnitude of Sydnor's stake in testifying against Freeman, it could have reached a significantly different impression of Sydnor's credibility. Freeman was barred from cross-examining Sydnor about facts that bore directly on the jury's consideration of the weight, if not the fact, of Sydnor's motive to testify as he did – facts underscoring dramatically his interest in satisfying the Government's expectations of his testimony. The Government's interest in keeping from the jury information the potential enormity of Freeman's sentence, if convicted, did not trump Freeman's entitlement under the Confrontation Clause. *See, Chandler*, 326 F.3d at 223. The Government's interest had to yield to Freeman's constitutional right to probe the potential biases, prejudices, or ulterior motives of the witnesses against him.

Sydnor was crucial to the Government's case. Only Sydnor testified that Freeman taunted Sester or that Freeman overheard the conversation where Lanham was told to "teach a lesson" to Sester. Sydnor's motive in testifying proved to be decisive. Thus, it is impossible to say the Court's error in limiting Sydnor's testimony did not have a substantial influence on the jury's verdict. *See e.g. Chandler*, 326 F.2d at 224 (holding the cooperating witness need not be the only witness against the defendant in order to find that the error was not harmless beyond a reasonable doubt).

Indeed, Sydnor gave different stories at every possible juncture.

Effective cross-examination is critical to a fair trial because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316. The constitutional right to cross-examine is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation," but that limitation cannot preclude a defendant from asking, not only "whether [the witness] was biased" but also "to make a record from which to argue why [the witness] might have been biased." *United States v. Schoneberg*, 396 F.3d 1036, 1042 (9th Cir. 2005) *quoting Davis*, 415 U.S. at 318.

The Court of Appeals' decision, which affirmed this unconstitutional limitation upon cross examination, is at odds with the decisions in *Chandler*, *Eagle*, and *Campbell*. This Court should grant this Petition to clarify that a criminal defendant has a right to cross examine the Government's witnesses as to the magnitude of the benefit they hope to receive as a result of their cooperation.

3. The Government alleged that Freeman violated the right of a pretrial detainee to be free from punishment. As the contours of that right have not been sufficiently delineated to provide notice that placing Sester in a general population cell would violate the right, Freeman's convictions must be reversed.

18 U.S.C. § 242 makes it criminal to act (1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States. *Screws v. United States*, 325 U.S. 91 (1945); *United States v. O'Dell*, 462 F.2d 224 (6th Cir. 1972). As explained in *United States v. Lanier*, 520 U.S. 259 (1997), neither § 241 nor § 242 describe the specific conduct forbidden, but each statute incorporates Constitutional law by reference. As explained in *Lanier*, neither statute "delineates the range of forbidden conduct with particularity." 520 U.S. at 265.

The Court in *Lanier* recognized the breadth of § 241 and § 242 created problems of "fair warning..." 520 U.S. at 265. The Court in *Lanier* noted there are three manifestations of the fair warning requirement. First is the vagueness doctrine, which bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." 520 U.S. at 266. The second is the canon of strict construction, which ensures fair warning "by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* Third, the Court noted that, although clarity at the requisite level may be supplied "by

judicial gloss on an otherwise uncertain statute...due process bars the Court from applying a novel construction of the criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope..." *Id.*

The difficulty of applying these standards to § 241 and § 242 was discussed in *Screws v. United States*, 325 U.S. 91 (1945). *Screws* held the expansive language of due process was "generally ill-suited to the far different task of giving fair warning about the scope of criminal liability." *Lanier*, 520 U.S. at 267. In *Screws*, the Court noted § 242 violates the fair warning requirement when it places "the accused...on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning." 325 U.S. at 101. The Constitutional difficulty is surmounted only when the accused is charged with violating a "right which has been made specific either by express terms of the Constitution...or by decisions interpreting [it]." 325 U.S. at 104. Thus, *Screws* limited the statute's coverage to rights fairly warned of, those having been "made specific" by the time of the charged conduct, 520 U.S. at 267.

Under *Lanier*, convictions under § 241 and § 242 can be upheld only if the Constitutional right at issue is "clearly established" and "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." 520 U.S. at 270. The Court in *Lanier* held that decisions discussing qualified immunity under 42 U.S.C. § 1983 were relevant in determining whether the right was "clearly established." 520 U.S. at 270-71. The *Lanier* Court concluded, as with civil liability, criminal liability may

be imposed for deprivation of the Constitutional right if, but only if, "in light of preexisting law the unlawfulness [under the Constitution is] apparent." 520 U.S. at 271-72.

With this standard in mind, it cannot be said the Government proved, beyond a reasonable doubt, the Constitutional right at issue was established with sufficient clarity to support Freeman's conviction. As a general rule, the Constitution imposes no duty to protect a citizen from harm by private persons. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *See also, Bukowsky v. City of Akron*, 326 F.3d 702, 711-12 (6th Cir. 2003) (Holding that police were entitled to qualified immunity because there was no evidence that the police knew of the man's dangerous propensities).

In *Davidson v. Cannon*, 474 U.S. 344 (1986), the Supreme Court held a jail official's disregard of a note warning of an impending attack on a prisoner could not support a § 1983 action. The guard took no action and the other inmate ultimately attacked the prisoner Davidson. The Court held the prison officials could incur no civil liability because lack of care simply does not approach the sort of abusive government conduct that the due process clause was designed to prevent." 474 U.S. at 347-48. The guard "mistakenly believed the situation was not particularly serious..." *Id.* But due process "has never been understood to mean the State must guarantee due care on the part of its officials." *Id. Jacquez v. Palmer*, 801 F.2d 789 (5th Cir. 1986) (That prisoner's death resulted from pattern of conduct by prison guards and that officials knew of conduct but did nothing was inadequate to establish civil liability).

Here, the Government claimed that the right involved was a pretrial detainee's right to be free from punishment that has no legitimate law enforcement purpose. The Government cited two cases – *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Lyons v. Powell*, 838 F.2d 28 (1st Cir. 1988). Neither case presented facts remotely similar to those presented here. The lack of factual similarity indicates the contours of the Constitutional right are not so clearly established as to permit the imposition of criminal liability.

In *Bell*, a pretrial detainee contended his due process rights were violated by the jail's "double bunking." In rejecting that claim, the Court commented "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. at 535. The Court cautioned, however, that "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense..." *Id.*, at 537. The Court then noted if an action is "arbitrary or purposeless" it may be inferred there is no legitimate law enforcement objective. *Id.*, at 539.

In *Lyons v. Powell, supra.*, the Court reversed the dismissal where a pretrial detainee alleged he was confined in a cell for 27 days with another inmate for 22 to 23 hours a day. He alleged he was given only a floor mattress. The Court held this conduct could give rise to a claim under § 1983.

While *Lanier* does not require identical facts before criminal liability may be imposed, the Court emphasized that to permit liability, either criminal or civil, the decisional law must apply with "obvious clarity to the specific conduct in question..." *Lanier*,

520 U.S. 271. In this case, Wright testified Lanham told him to "fuck with" Sester. Lanham selected Wright because Wright was a non-violent offender. Lanham wanted Wright to emphasize that Sester should straighten up before he gets in serious trouble. Sydnor and Guthrie both said this was the intent of having Lanham talk to Wright. There was no evidence Lanham intended any harm. Lanham's comment, innocuous in intent, was not arbitrary or purposeless. Nor can it be said that having one inmate talk to another, for the purpose of discouraging future conduct, serves no legitimate law enforcement objective. Bobby Wright did not believe that Lanham wanted Sester hurt. (Tr. Vol. 2B, pp. 77-85). In fact, Wright confessed to being "shocked" when he saw Sester becoming the victim of sexual assault. (*Id.*, p. 85). There had been no prior incidents of sexual assault at the GCDC and Wright himself had never seen any such incident previously. (*Id.*, p. 91; Tr. Vol. 3A, p. 43).

Neither *Bell* nor *Lyons* are even remotely similar to this case. No decisions have imposed civil or criminal liability for pretrial punishment under facts even distantly similar to those presented herein. Indeed, those cases imposing liability for violation of a pretrial detainee's rights have generally involved situations where the prison official personally assaulted an individual. *See, United States v. Lanier*, 520 U.S. at 272, n. 7.

In *Crow v. Montgomery*, 403 F.3d 598 (8th Cir. 2005), a pretrial detainee brought a § 1983 lawsuit after he was punched by other inmates and received a broken jaw. The Court reversed the denial of qualified immunity because the facts did not establish the jail

officials disregarded any known risk to the detainee. The jail officials may have acted unreasonably, but that did not rise to deliberate indifference. A prison official's Constitutional obligation is to provide reasonable safety, but due regard must be given to the jail's unenviable task of keeping dangerous men in custody under humane conditions. Simple negligence does not prove a Constitutional violation. *Id.*, at 603. An action for deliberate indifference to prisoner rights cannot be predicated merely on knowledge of the general risk of violence in prison. *Weiss v. Cooley*, 230 F.3d 1027, 1032-33 (7th Cir. 2000).

Jail officials must know of "an obvious, substantial risk" to the prisoner in order for a plaintiff to prevail. *Little v. Mondragon*, 83 F.3d 1197, 1205-06 (10th Cir. 1996). Thus, a jail's failure to check a group cell for an hour before the beating of a pretrial detainee did not show deliberate indifference. *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995).

In this case, the prosecution's theory against Freeman was that he knew of risk to Sester, but failed to act. This does not prove deliberate indifference. Freeman did not create the allegedly dangerous situation; did not make the decision to place Sester in general population; did not select Cell 101; had no knowledge of any violent propensities of the inmates in Cell 101; did not tell Bobby Wright to "fuck with" Sester. Freeman said nothing. If prisoner Wright is believed, Freeman nodded his head. Moreover, Sester would have been placed in Cell 101 irrespective of Freeman's actions had he failed to post bond.

The Government relied upon *Farmer v. Brennan*, 511 U.S. 825 (1994), in claiming that the constitutional

right was established with the requisite clarity. But, in *Farmer,* the inmate at issue was a preoperative transsexual who presented feminine characteristics. Such an individual would obviously be more at risk than an eighteen year old man. Similarly, the individual in *Farmer* was transferred from a correctional institute to a penitentiary, which was higher security facility. In this case, however, Sester was housed in a county jail. Third, the penitentiary involved was known to be a facility with more troublesome prisoners. In this case, the Government offered no evidence of the prior histories of any of the inmates in Cell 101. Despite these much more egregious acts in *Farmer v. Brennan, supra*, the Court cautioned against imposing liability under this theory of "deliberate indifference." Even in a civil case, there must be a showing that the official involved was subjectively aware of the risk. The Court in *Farmer*, noted that to prove deliberate indifference, there must be a showing of "a state of mind more blameworthy than negligence."

The Court commented:

> We reject Petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk a serious harm exists, *and he must also draw the inference*. This approach comports best

> with the text of the Amendment as our cases have interpreted...An act or omission unaccompanied by knowledge of a significant risk of harm might as well be something that society wishes to discourage...The common law reflects such concerns when it imposes tort liability on a purely objective basis...But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment...

511 U.S. at 837. (Emphasis added: Citations omitted).

In *Farmer* the Court noted that a jury could infer that there was deliberate indifference to a substantial danger of inmate attacks where the risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the official being sued had been exposed to information concerning the risk and thus "must have known" about it..." 511 U.S. at 842. In those circumstances, the evidence would be sufficient.

But, there is no such evidence here. There was no evidence of similar attacks at the GCDC. There was no evidence Shawn Freeman was aware of any such attacks. There was no "well-documented" history of sexual assaults. No prison official, prior to the attack on Sester, made any notation of any risk of attack. Given Freeman's relative lack of training and junior status of the jail, there is certainly no information that Freeman "must have known" or drew the inference of these risks. Indeed, the GCDC had no written policies

concerning where a detainee should be placed; when a detainee should be placed in general population; or when a detainee should be segregated.

Other facts noted in *Farmer* as being sufficient to prove deliberate indifference are lacking here. For example, the Court held that a prisoner could establish exposure to a significantly serious risk of harm "by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates" or, for example, that prison official were aware that "rape was so common and uncontrolled that some potential victims dared not sleep [but] instead...would leave their beds and spend the night clinging to the bars nearest the guard station." 511 U.S. at 843-44. None of those facts are present here.

From the lack of relevant precedent, this Court must conclude that the Constitutional violation alleged was not proven, as the right was not "clearly established." The Court of Appeals' decision conflicts with this Court's decisions in *Lanier, Screws, Davidson* and *Farmer*, as well the Circuit Court of Appeals opinions cited above, all of which declined to impose civil liability under facts which demonstrated, far more clearly than the facts here, that the inmate or detainee was at risk of attack.

4. The Government must prove that Freeman did more than possess knowledge of the existence of a conspiracy and approve of its goals in order to obtain a conviction. The Court of Appeals' holding that Freeman's alleged knowledge of the conspiracy was sufficient to impose criminal liability as a conspirator is in conflict with decisions from other appellate circuits.

18 U.S.C. § 241 requires an unlawful conspiracy based on an unlawful agreement. *Steedle v. United States*, 85 F.2d 867 (3rd Cir. 1986). It must be shown the offender acted with specific intent to interfere with federal rights. A general intent to injure is not sufficient. *United States v. Guest*, 383 U.S. 745 (1966); *Anderson v. United States*, 417 U.S. 211 (1974).

Mere acquiescence or silence or the failure of an officer to perform his duty does not make him a conspirator, unless it is also shown that he acted or failed to act with knowledge of the conspiracy's purpose and with a view of protecting and aiding it. *Luteran v. United States*, 93 F.2d 395 (8th Cir. 1937), *cert denied*, 303 U.S. 644 (1938), *reh. denied*, 303 U.S. 668 (1938).

The Government was required to prove beyond a reasonable doubt not only that a conspiracy existed, but that Freeman knew of it and, with that knowledge, voluntarily joined it. *United States v. Littrell*, 574 F.2d 828, 832 (5th Cir. 1978); *United States v. Bobo*, 586 F.2d 355, 368 (5th Cir. 1978), *cert denied sub. nom., Rowen v. United States*, 440 U.S. 976 (1979), *reh. denied*, 441 U.S. 957 (1979).

Construing the evidence in the light most favorable to the Government, the evidence was insufficient to prove Freeman voluntarily joined the conspiracy or participated therein. The facts established:

1. Freeman was in the Booking Area while Sydnor and Lanham discussed teaching Sester a lesson;

2. Freeman may have participated in "teasing" Sester about his appearance;

3. Freeman and Lanham walked down Hall 26; and,

4. Lanham, while near Freeman, told Bobby Wright to "fuck with" Sester.

No witness claimed Freeman heard Sydnor's instruction to Lanham or that Freeman acknowledged agreement with Sydnor's plan. In fact, all witnesses testified Freeman said nothing to Sydnor and Sydnor said nothing directly to Freeman. Indeed, if we assume Freeman participated in teasing Sester, that conduct, while perhaps inappropriate, cannot give rise to criminal responsibility. It does not indicate intent to join a conspiracy to violate civil rights.

Likewise, Bobby Wright's testimony is insufficient to connect Shawn Freeman to the conspiracy. Wright testified Freeman nodded his head when Lanham made his comment. Wright did not view Lanham's comment as troublesome, thinking inmates would just "joke" with Sester. (Tr. Vol. 2B, p. 78). In fact, Wright was "shocked" when he found out the inmates assaulted Sester. (Tr. Vol. 2B, p. 85). Moreover, one

can only find a causal connection if one ignores Sydnor's insistence upon placing Sester in Cell 101 after the inmates began shouting about Sester. One must also ignore the causal relation between the assault and Sester's comments about John Canafax. The District Court, however, opined that a nod was enough to draw Shawn Freeman into the conspiracy. The District Court erred in holding that a nod of the head – without additional evidence of a knowing and voluntary action to join the conspiracy – was enough to prove Shawn Freeman's connection to the conspiracy beyond a reasonable doubt.

"Guilt is individual and personal, even as regards to conspiracies...." *United States v. Watson*, 594 F.2d 1330, 1337 (10th Cir. 1979), *cert denied*, 444 U.S. 840 (1980). Mere association with an individual involved in a conspiracy is not enough to convict. Mere knowledge of the conspiracy and even acquiescence in it is not enough to convict. *United States v. Davenport*, 808 F.2d 1212 (6th Cir. 1987); *United States v. Richmond*, 700 F.2d 1183 (8th Cir. 1987). The Government was required to prove beyond a reasonable doubt that Shawn Freeman undertook some act to join this conspiracy. *United States v. Cloughessy*, 572 F.2d 190 (9th Cir. 1977). A nod shows, at most, knowledge of the conspiracy and arguably agreement with it. But knowledge, approval, and even acquiescence are not enough to ensnare one within the scope of a conspiracy. *United States v. Falcone*, 311 U.S. 205 (1940). *See also, United States v. Chandler*, 586 F.2d 593, 602 (5th Cir. 1978), *cert denied*, 440 U.S. 927 (1979) (granting directed verdict of acquittal, because "mere knowledge, approval or acquiescence in the object or purpose of a conspiracy is insufficient to prove participation in it...").

To be guilty of a conspiracy, one must "knowingly contribute his efforts to the furtherance of the conspiracy." *United States v. Wilford,* 710 F.2d 439, 448 (8th Cir. 1983). An agreement to violate the law is essential and must be proven beyond a reasonable doubt. *United States v. Migliaccio*, 34 F.3d 1517, 1521 (10th Cir. 1994). *See also, United States v. Butler,* 494 F.2d 1246, 1249 (10th Cir. 1974).

The requirement of an agreement was discussed in *United States v. Migliaccio*, *supra*. The Defendants there were doctors charged with conspiracy to defraud the United States by seeking payments for medical procedures to which they were not entitled. They were convicted of conspiracy, but the Court of Appeals reversed. The Court held the evidence was insufficient because there was proof of an agreement. Rather, in that case, as here, the Government relied upon inferences. The inferences were that Defendants practiced medicine together, shared a billing system, assisted each other in surgery, and advertised heavily together. The Court held such evidence was insufficient to constitute proof of a conspiracy. The Court noted a juror "might infer that one defendant had knowledge of the other's intent, but knowledge, by itself, is insufficient to create a conspiracy." 34 F.3d at 1522.

Similarly here, construing the evidence in the light most favorable to the Government, Freeman arguably knew of the agreement between Sydnor and Lanham; possibly knew of Lanham's instruction to Wright; and, potentially agreed with that instruction. As in *Migliaccio*, and the other cases cited, knowledge of, acquiescence in, and even approval of a conspiracy is not sufficient to make one a co-conspirator. *United*

States v. Davenport, supra. Rather, the Government must prove Freeman voluntarily joined Sydnor's plan. The Government's proof on this point was absent and the conspiracy charge should not have been submitted to the jury.

The District Court and the Court of Appeals ignored these principles, finding guilt from Freeman's alleged knowledge of and assumed agreement with the goals of the conspiracy carried out by Sydnor, Powell, and possibly Lanham. In so doing, the Courts below impermissibly relaxed the standard of proof necessary to prove involvement in a conspiracy.

CONCLUSION

Based on the foregoing authority and arguments, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 08-6504/6506; 09-5094/5095

[Filed August 24, 2010]
Corrected September 29, 2010

UNITED STATES OF AMERICA, *Plaintiff-Appellee / Cross-Appellant (09-5094 / 5095),*	)
v.	)
WESLEY LANHAM (08-6504; 09-5094); SHAWN FREEMAN (08-6506; 09-5095), *Defendants-Appellants / Cross-Appellees.*	)

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
Nos. 08-00005-002; 08-00005-003—Danny C. Reeves, District Judge.

Argued: March 5, 2010

Decided and Filed: August 24, 2010

Before: KEITH, BOGGS, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Martin S. Pinales, STRAUSS & TROY, Cincinnati, Ohio, Randy J. Blankenship, BLANKENSHIP MASSEY & STEELMAN, PLLC, Erlanger, Kentucky, for Appellants. Conor B. Dugan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Martin S. Pinales, Candace C. Crouse, STRAUSS & TROY, Cincinnati, Ohio, Randy J. Blankenship, C. Ed Massey, BLANKENSHIP MASSEY & STEELMAN, PLLC, Erlanger, Kentucky, for Appellants. Conor B. Dugan, Mark L. Gross, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

DAMON J. Keith, Circuit Judge. Defendants Wesley Lanham ("Lanham") and Shawn Freeman ("Freeman") were convicted of violating an inmate's civil rights in violation of 18 U.S.C. §§ 241 and 242, and making a false entry in violation of 18 U.S.C. § 1519. Defendants were prison jailers when prison inmate, J.S., was raped in jail. Defendants and their supervisor, Shawn Sydnor ("Sydnor"), decided to "scare" J.S. after he was arrested for committing a traffic violation, by placing him in a general population jail cell. Defendants now appeal their convictions and

sentences, arguing that there was insufficient evidence to support their convictions, and Freeman claims that he was entitled to a downward sentencing departure. The government appeals the district court's application of the 2006 Sentencing Guidelines to Defendants' sentences and refusal to apply a sentencing enhancement to Lanham. For the reasons discussed herein, we **AFFIRM**.

I. BACKGROUND

On February 14, 2003, Defendants Lanham and Freeman were working as corrections officers at the Grant County, Kentucky, Detention Center. Sergeant Shawn Sydnor and deputy jailers Jack Powell ("Powell"), Mark Coleman, Wendy Guthrie ("Guthrie"), and Lula Garrison were also working the same shift, which began on February 13, 2003, at 11 p.m. and ended on February 14, 2003, at 7 a.m. Lanham and Freeman were assigned to the Class D section of the Detention Center, and Sydnor was the supervisor that evening. That evening, J.S. was arrested for a traffic violation and brought to the Detention Center by Sheriff's Deputy Scott Allen. J.S. had been speeding and was arrested for eluding police. Deputy Allen told Sergeant Sydnor that J.S. had almost hit an off-duty police officer, who was Sydnor's friend.

J.S. was eighteen years old, six feet tall, and weighed around 125 pounds. He had blond highlights in his hair, wore a bright shirt, and had heart shapes on his undershorts. Sydnor described J.S. as a "[s]cared little kid" who was "[s]issy looking." (R. 91, Tr. at 51.) When J.S. arrived, Sydnor called Guthrie, Lanham, and Freeman to come to the booking room to look at J.S.'s hair. During booking, Sydnor, Lanham,

and Freeman teased and laughed at J.S. The officers told J.S. that he looked "like a girl" and a "sissy," and they made fun of his highlighted hair and undershorts. (R. 91, Tr. at 54.) Sydnor told J.S. that he was "cute" and testified that he heard someone tell J.S. that he would make a "good girlfriend for the inmates." (*Id.* at 55.) J.S. began shaking and crying. Powell testified that he asked J.S. "what he was thinking, wearing silk heart shaped boxers in jail on Valentine's Day." (R. 86, Tr. at 118.) Powell noted that "[i]t wasn't very smart because of the sexual content that could be brought because of it." (*Id.*) J.S. was booked at 1:05 a.m.

Sydnor told Lanham and Freeman that J.S. "needed to be scared." (*Id.*) Sydnor asked them to find J.S. a general population cell. Lanham stated that he "knew a guy down in 26 Hall" in Cell 101, Bobby Wright. (R. 91, Tr. at 57-58.) The inmates housed in 26 Hallway included those convicted of misdemeanors and felonies, and 26 Hallway was known as the "hallway from hell." (*Id.* at 59, 64.) Detention Center Nurse Sandy Cook ("Nurse Cook") described the inmates there as "almost . . . animalistic," noting that "there was so much testosterone . . . it was just a horrible place." (R. 93, Tr. at 29.) Sydnor testified that he was aware of instances of inmates expressing concern about sexual assault; that sexually predatory behavior occurred in the prison; and that 26 Hallway had more incidents of sexually predatory conduct than other areas of the jail. Jailer Guthrie testified that the Detention Center staff were aware of 26 Hallway's violent reputation.

Cell 101, which is located in 26 Hallway, housed felony-convicted prisoners, and there were between twelve and fourteen inmates in the cell that evening.

Among the prisoners was Victor Zipp, who was known as an intimidating leader in the cell. Zipp was often naked, and guards frequently had to tell him to put on clothes. Lanham and Freeman had both worked in 26 Hallway prior to February 13, 2003. Earlier that evening, Freeman had assisted in the removal of an inmate from Cell 102 in 26 Hallway whom inmates had beaten up. Bobby Wright testified that the inmates in 26 Hallway were "pretty rowdy" and "were looking for anything to go down again." (R. 86, Tr. at 72.)

After Lanham volunteered that he knew an inmate in Cell 101, he and Freeman left booking and proceeded to 26 Hallway. After they left, Wendy Guthrie told Sydnor, "please don't put [J.S.] down there, somebody is going to beat him up." (R. 92, Tr. at Page 4 132-33.) Sydnor told her that it was none of her business and that he wore the sergeant's stripes. Lanham and Freeman proceeded to Cell 101. Inmate Wright went to speak to Lanham and Freeman, and there were other inmates around the door as well. Lanham and Freeman were both standing outside the door while they spoke to Wright. Lanham and Freeman told Wright they were going to bring J.S. down to Cell 101, and Lanham told Wright they wanted him to "f-ck with" J.S. Freeman shook his head up and down as Lanham spoke. The other inmates standing close to the door reacted with celebration. Neither Lanham nor Freeman told the inmates to avoid hurting J.S. Wright testified that the inmates began behaving in ways that he had never seen before immediately after the guards told the inmates to "f-ck with" J.S.

Lanham and Freeman returned to the booking area, and Lanham told Sydnor that he had spoken to Wright and that everything had been "taken care of." (R. 91, Tr. at 62.) Sydnor and Powell then escorted J.S. to Cell 101 in 26 Hallway. J.S. was crying. Sydnor testified that the inmates were "hollering" and being "rowdy and noisy." (R. 92, Tr. at 5.) J.S. overheard an inmate call out, "Oh, it's Valentine's Day, bring him here. He'd make a good girlfriend." (R. 86, Tr. at 37.) Powell heard an inmate describe J.S. as "pretty" and "cute." (*Id.* at 121.) Because of the sexual comments, Powell was concerned that this area was not safe for J.S. At least three or four inmates waited at the door when J.S. arrived and as he entered the cell. Some said things like, "He's so pretty, bring him in here. We've got a nice spot for him." (*Id.* at 38.) J.S. said he heard one of the guards say, "Here you go boys. I got some fresh meat for you." (*Id.* at 38-39.) A guard pushed J.S. into the cell and closed the door.

An inmate then grabbed J.S. around the arm and led him over to a bed. Inmates played with his hair, saying, "Oh it's so pretty. I love blond highlights. You look just like a girl." (*Id.* at 39.) Soon after, several inmates picked him up, started taking off his clothes, and slapped him with their prison flip-flops. J.S. called out for help numerous times, but no one responded. The inmates then dropped J.S. on his back and took him into the cell's shower area. The inmates pushed him against the shower wall and turned on the hot water; an inmate started beating his head against the wall. J.S. felt a strong pain in his buttocks and believed he was being anally raped. Eventually, J.S. got out of the shower and tried to run towards the door, but he fell on the floor. Zipp came out of the shower area naked. Some inmates picked J.S. up and

started pressing his buttocks against the cell's window. Zipp told J.S. he had two choices: "Either get f-cked in the ass or suck my dick." (*Id.* at 44.) J.S. told him that he did not want to do either and said no several times. An inmate came up behind J.S., punched him in the head, and forced him to open his mouth. Zipp grabbed J.S. by the hair and forced his penis into J.S.'s mouth. J.S. bit down as hard as he could, and Zipp withdrew. An inmate hit him in the head again. After that, J.S. was left alone.

The guards left J.S. in Cell 101 all night and never checked on him. Later that morning, J.S. was brought to pretrial services. J.S. saw the Detention Center's nurse, Nurse Cook, who testified that J.S. told her that "he had been traumatized and he been raped and he had been abused all night long." (R. 93, Tr. at 32.) Around 10:00 a.m., J.S. learned that he would be released from the jail, and his father picked him up. As they left, J.S. told his father that the jailers had placed him in a cell with other inmates, and that the inmates had raped him. A day or two later, J.S.'s father brought him to St. Luke's Hospital where he was treated for abrasions inside his mouth, bruising on his left buttocks, and an abrasion on his left lower chin and lower left leg.

Subsequent to February 14, 2003, Lanham admitted that he spoke to Bobby Wright that night. Lanham admitted that the officers intended to scare J.S. and that they spoke to Wright about this. He admitted that he participated in the plan for J.S. to be housed in Cell 101. He also admitted that he knew that the guards had no control over what happened to J.S. after he was placed into Cell 101. Several witnesses testified that the general population cells

were not safe for someone without prison experience, and J.S. in particular. Deputy Wendy Guthrie stated that she had no doubt that danger was awaiting J.S. when he was placed in Cell 101. She was concerned that "he would get beat up." (R. 92, Tr. at 13.) Nurse Cook testified that she did not believe that J.S. would have been safe in 26 Hallway because of its gang members, and that it was inappropriate to house him there. Inmate Wright testified that Lanham was aware that the prison housed violent felons.

During the shift beginning the night of February 14, 2003, Sydnor and the other officers learned that J.S. had been raped and beaten in the cell. Sydnor fabricated a story and told Lanham and Freeman to say that they needed to move J.S. to the general population cells because the detox cells needed to be decontaminated. However, J.S. was the only prisoner moved out of the detox cells that night, and Sydnor had told Lanham and Freeman nothing about the detox cell before J.S. was moved. Sydnor and Powell then signed a false statement that stated that they put J.S. in Cell 101 because they were decontaminating the detox area. Powell later testified that he never decontaminated a detox cell nor saw such decontamination that night.

Sydnor also told both Lanham and Freeman that they needed to get their stories straight about the previous shift and "to be on the same page," because they all "were in a lot of trouble." (R. 92, Tr. at 17.) In response, Lanham wrote and signed a false statement that the detox cells needed to be emptied on the morning of February 14, 2003, in order to clean them. Lanham further wrote, falsely, that at the end of his shift, he asked Sydnor and Wright about J.S. and they

told him that J.S. was fine. Freeman wrote that he and Lanham left the booking area and that they passed through 26 Hallway to do "a secure check for Sgt. Sydnor." Sydnor also told Guthrie to write a false statement, but she refused.

Sydnor, Lanham, and Freeman were subsequently arrested and charged with violating J.S.'s civil rights and false entry. Sydnor pleaded guilty to conspiracy to violate J.S.'s civil rights in violation of 18 U.S.C. § 242, and conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. The indictment in the present case against Sydnor was subsequently dismissed, and he cooperated with the government in its case against Lanham and Freeman. After a jury trial, Freeman and Lanham were found guilty of conspiracy to violate J.S.'s civil rights in violation of 18 U.S.C. §§ 241 and 242, and making a false entry in violation of 18 U.S.C. § 1519.

The Probation Office prepared a Presentence Investigation Report ("PSR") for each defendant. The government and the defendants objected to the PSRs. The government argued that the more onerous 2008 Sentencing Guidelines applied rather than the 2002 Guidelines used in the PSR. The government also argued that a four-level upward adjustment for Lanham's role as an organizer or leader should apply pursuant to U.S.S.G. § 3B1.1.(a). The PSR proposed a two-level downward adjustment to Freeman's sentence, based on his minimal involvement, but that adjustment was objected to by the government and rejected by the district court. The district court rejected the government's request for an upward enhancement for Lanham's leadership role and refused to apply the 2008 Guidelines. The court sentenced

Lanham to 180 months and Freeman to 168 months in prison.

II. ANALYSIS

1. Jury Selection

A. *Standard of Review*

A district court's determinations during jury *voir dire* are reviewed for an abuse of discretion. *See United States v. Guzman*, 450 F.3d 627, 629 (6th Cir. 2006), *cert. denied*, 549 U.S. 1185 (2007) (citing *United States v. Phibbs*, 999 F.2d 1053, 1071 (6th Cir. 1993)). "Only in the case of manifest error will [this Court] overturn a finding of juror impartiality." *Id.* A district court's determination "regarding the credibility of jurors' assurances should receive substantial deference on appeal." *United States v. Corrado*, 304 F.3d 593, 604 (6th Cir. 2002). "[A] trial court's finding that a juror was impartial is entitled to a presumption of correctness, rebuttable only upon a showing of clear and convincing evidence." *Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003).

B. *Merits*

The Sixth Amendment "guarantees an accused the right to be tried 'by an impartial jury.'" *Guzman*, 450 F.3d at 629 (quoting U.S. Const. amend. VI). "When a juror's impartiality is at issue, the relevant question is 'did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.'" *Dennis*, 354 F.3d at 520 (quoting *Patton v. Yount*, 467 U.S. 1025, 1036 (1984)).

Defendants argue that the district court abused its discretion by declining to strike Jurors 56 and 143 for cause because both jurors expressed doubt concerning their ability to put aside news reports that they had read about the case. Defendants claim that neither juror was able to provide adequate assurances of impartiality. Juror 56 had read about the case in the newspaper and stated, "I haven't completely made up my mind, but based on what I've read, it's pretty made up." (R. 90, Tr. at 27.) Juror 56 concluded by saying, "[R]ight now I'm obviously not totally neutral. But I can certainly try." (*Id.* at 27.)

Juror 143 also admitted to having read news articles about the case and stated that he had an opinion about the case. (*Id.* at 38.) He stated, "It's hard not to read material like that without . . . making a judgment. On the other hand, I do believe I could make a judgment here based on what's presented. I really can't answer your question [about my belief in the defendants' guilty] yes or no, it's a degree." (*Id.* at 38.) Juror 143 continued that he could "compartmentalize" the knowledge from the article and stated that he would try his "darndest to do that." (*Id.* at 39.) But he also stated, "It's kind of a question, though, you can't really answer definitively." (*Id.*)

Neither Juror 56 nor Juror 143 were able to definitively state that they would be impartial and decide the case based on the facts presented at trial. Although they both stated that they would *try* their best to do so, they both wavered in their ability to be fair jurors. A "juror [must] give an affirmative promise of impartiality . . . [which is] believable in light of what the juror has revealed and the context of the case." *Holder v. Palmer*, 588 F.3d 328, 344 (6th Cir. 2009). In

Wolfe v. Brigano, "the trial judge based his findings of [juror] impartiality exclusively upon each juror's tentative statements that they would *try* to decide this case on the evidence presented at trial." *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000) (emphasis added). This Court held that "[s]uch statements, without more, are insufficient." *Id.* (citing *Goins v. McKeen*, 605 F.2d 947, 953 (6th Cir. 1979)). Likewise, the noncommittal statements made by Jurors 56 and 143 were not a sufficient basis for finding impartiality, and the district court's failure to allow a for-cause challenge to these jurors was an abuse of discretion. Neither juror promised to remain impartial, and both seemed affected by the news accounts that they had read. The trial court abused its discretion by denying Defendants' motion to strike these jurors for cause.

Nonetheless, Defendants have failed to demonstrate that any harm resulted from this abuse of discretion. Jurors 56 and 143 were excluded from the final jury composition by Defendants' peremptory challenges. Where a defendant uses a peremptory challenge to "cure" a district court's failure to excuse a juror for cause, and the defendant is "subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000); *see also McQueen v. Scroggy*, 99 F.3d 1302, 1321 (6th Cir. 1996) ("It is insufficient simply to claim that, had there been another peremptory available, a different juror would have been excluded, and the result might have been a more favorable jury.") (overruled on other grounds by *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (en banc), judgment vacated by *Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005)). The case which Defendants rely on

to support reversal on this ground, *Wolfe v. Brigano*, 232 F.3d at 500, is inapposite to this case – the impaneled jury included four biased jurors who participated in the trial. Here, in contrast, the biased jurors never participated in the trial and were removed through peremptory challenges.

Freeman also argues that the court improperly granted the government's request to strike Juror 88 for cause. Juror 88 told the district court that she had worked with Freeman's attorney for fifteen years. She stated that she worked with him on many occasions, had a good relationship with him, and would be sympathetic to him. Freeman argues that the district court's applied a different standard to the government when it requested a motion to strike for cause. However, the district court was justifiably concerned about the long-term and personal nature of Juror 88's relationship with defense counsel. This Court has held that "close and ongoing" relationships of jurors may be grounds for removing a juror for cause. *Wolfe*, 232 F.3d at 502.

For the foregoing reasons, the Defendants' have failed to show that there was an unconstitutional jury error.

2. Limits on Cross Examination

A. Standard of Review

Defendants contest the limitations that the district court imposed on the cross-examination of Sydnor, including the prohibition of questions concerning certain details of Sydnor's cooperation agreement with the government. Trial counsel failed to object to the

limitations on the cross-examination imposed by the district court that appellate counsel now challenges. Where trial counsel fails to object to a trial error raised on appeal, the plain error standard applies. *See United States v. Hadley*, 431 F.3d 484, 498 (6th Cir. 2005). To find that there was plain error, this Court must find that: 1) an error occurred in the district court; 2) the error was plain, *i.e.* obvious or clear; 3) the error affected the defendant's substantial rights; and 4) this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings. *See United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998).

B. *Merits*

At trial, the district court stated that, "the parties would be able to certainly ask questions about the defendant [Sydnor] entering a plea guilty in exchange for hoping to receive a lesser punishment [but] if it goes much beyond that, it may become objectionable." (R. 90, Tr. at 7.) Consequently, the jury was prevented from knowing the length of Sydnor's potential sentence, and Defendants' sentences as well. Defendants claim that their trial attorneys limited their questioning of Sydnor because of the court's order.

"The Confrontation Clause of the Sixth Amendment guarantees a defendant an opportunity to impeach the credibility of a witness against him because impeachment is fundamental to effective cross-examination." *United States v. Holden*, 557 F.3d 698, 704 (6th Cir. 2009) (citing *Davis v. Alaska*, 415 U.S. 308, 315-18 (1974)). Trial courts "retain great discretion to impose reasonable limits on the cross-

examination of witnesses . . . ." *United States v. Davis*, 430 F.3d 345, 360 (6th Cir. 2005) (internal quotations and citations omitted). In determining whether a district court has abused its discretion in limiting cross-examination, this Court "must decide whether, despite the limitation of cross-examination, the jury was otherwise in possession of sufficient information . . . to make a 'discriminating appraisal' of a witness' motives and bias." *United States v. Kone*, 307 F.3d 430, 436 (6th Cir. 2002) (internal citations, quotations, and alterations omitted).

Because defense counsel failed to object to the limitation at trial, the plain error standard applies. There is a circuit split on the issue of whether defendants should be prohibited from asking cooperating witnesses, and former co-conspirators, details about their sentences and sentencing agreements with the government to expose the witnesses' bias, and the Sixth Circuit has not considered this issue in a published decision. *Compare United States v. Chandler*, 326 F.3d 210, 218-24 (3d Cir. 2003) (holding that the district court abused its discretion when it limited defendants' ability to cross-examine co-conspirators about their sentences) *with United States v. Cropp*, 127 F.3d 354, 358-59 (4th Cir. 1997) (holding the opposite). Where there are conflicting authorities, the district court could not have committed plain error. *See United States v. Williams*, 53 F.3d 769, 772 (6th Cir. 1995) ("[A] circuit split precludes a finding of clear error."). "At a minimum, court of appeals cannot correct an error . . . unless the error is clear under current law." *United States v. Olano*, 507 U.S. 725, 734 (1993). Because the law on this issue is not clear, the district court did not commit plain error.

Accordingly, the district court's determination is **AFFIRMED**.

3. Sufficiency of the Evidence

A. *Standard of Review*

In reviewing the sufficiency of the evidence to uphold a conviction, this Court asks "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime.'" *United States v. Jones*, 102 F.3d 804, 807 (6th Cir. 1996) (emphasis in original) (quoting *United States v. Swidan*, 888 F.2d 1076, 1080 (6th Cir. 1989)). The "defendant claiming insufficiency of the evidence bears a very heavy burden." *United States v. Fekete*, 535 F.3d 471, 476 (6th Cir. 2008) (internal quotations and citations omitted). "If we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, then the conviction must be upheld." *Id.*

B. *Merits*

a. Civil Rights Violations

Lanham and Freeman contest their convictions for committing civil rights abuses in violation of 18 U.S.C. §§ 241, 242. Under 18 U.S.C. § 241, it is a crime when "two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." This statute provides for enhanced penalties if the

conspiracy's "acts include kidnapping or . . . aggravated sexual abuse . . . ." 18 U.S.C. § 241. Here, the indictment charged Lanham and Freeman with conspiring to injure J.S. and depriving him of his rights not to be deprived of liberty without due process. The indictment further charged that the conspiracy included sexual acts. "To obtain a conviction for conspiracy to violate civil rights under § 241, the government must prove that [defendants] knowingly agreed with another person to injure [the victim] in the exercise of a right guaranteed under the Constitution." *United States v. Epley*, 52 F.3d 571, 575-76 (6th Cir. 1995). The government also must prove beyond a reasonable doubt that there was specific intent to commit the deprivation. *Id.*

Under 18 U.S.C. § 242, "[w]hoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or law of the United States" has committed a federal crime. If "bodily injury results from the acts," the defendant shall be fined under this title or imprisoned not more than ten years, or both. *Id.* "[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citation omitted). Prison officials are "not free to let the state of nature take its course [in a prison]." *Id.* "Prison conditions may be 'restrictive and even harsh,' but gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective.'" *Id.* (internal citations, quotations, and alterations omitted). A prison official can be found guilty where "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the

inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Ford v. County of Grand Traverse*, 535 F.3d 483, 495 (6th Cir. 2008) (quoting *Farmer*, 511 U.S. at 837)).

Lanham argues that J.S.'s sexual assault was not reasonably foreseeable and that there was insufficient evidence to support his conviction. However, the evidence established that Lanham joined Sydnor in mocking J.S. about his slight appearance, and he was present when Sydnor said that J.S. would make a "good girlfriend." When Sydnor stated that they needed to teach J.S. a lesson, Lanham quickly volunteered that he knew a prisoner in Cell 101. The evidence showed that Lanham talked to Inmate Wright, within earshot of other inmates, and explained that the guards would be bringing a new prisoner down and that they wanted the prisoners to "f-ck with" him. The evidence also showed that the inmates cheered at this news when Lanham was present, and Lanham knew of 26 Hallway's and Zipp's reputations.

Additionally, there was evidence that pretrial detainees were normally housed in the detox cells, not in the general population. Lanham stated that J.S. should have been in a detox cell and admitted that he asked Wright to teach J.S. a lesson. Finally, the evidence established that Lanham worked to cover up his actions after the fact. It is immaterial that he was not at Cell 101 when J.S. was brought there because a conspirator "need not have personally performed the deed for which he is being held liable. A conspirator can be held criminally liable for the actions of his co-conspirators committed during and in furtherance of the conspiracy." *United States v. Gresser*, 935 F.2d 96,

101 (6th Cir. 1991) (citation omitted). Taken together, in the light most favorable to the prosecution, this evidence was adequate for a rational fact-finder to find that Lanham violated both 18 U.S.C. § 241 and 18 U.S.C. § 242. He acted with deliberate indifference and in furtherance of the conspiracy to place J.S. in harm.

Freeman also argues that the evidence was insufficient to support his conviction. Freeman taunted J.S., joined Lanham in taking action to solicit inmates to harm J.S., failed to check on J.S. throughout the five hours he was in Cell 101, and then joined in the cover up of his assault. Sydnor testified that he told both Lanham and Freeman of his plan to scare J.S., and that Freeman did not object to the plan. Officer Guthrie testified that Freeman was present during the discussion of the plan to scare J.S. Freeman went with Lanham to Cell 101 to solicit Inmate Wright's assistance in scaring J.S. "Although mere presence at the crime scene is insufficient to show participation, a defendant's participation in the conspiracy's common purpose and plan may be inferred from the defendant's actions and reactions to the circumstances." *United States v. Salgado*, 250 F.3d 438, 447 (6th Cir. 2001), *cert. denied*, 534 U.S. 936 (2001) (citation omitted).

Wright testified that while Lanham told him that they wanted him to "f-ck with" J.S., Freeman was standing at the door "agreeing with Lanham, shaking his head yes." The jury could reasonably have found that Freeman knew and intended to join the conspiracy to place J.S. in a general population cell to "scare" him. Freeman also failed to protect or assist J.S. after learning of the plan. Freeman testified that he had a duty to protect J.S., and his failure to do so could reasonably have been interpreted by the jury as

acquiescence in the conspiracy. Viewing the evidence in the light most favorable to the prosecution, a rational fact-finder could find that Freeman participated in the conspiracy and violated the relevant statutes.

Furthermore, the record provides evidence that there was an objective risk of harm for someone like J.S. Although Freeman argues that Sydnor is the only person who knew that J.S. would be at risk if placed in the general population cells, Guthrie, Powell, and Nurse Cook all testified that J.S.'s placement in 26 Hallway was inappropriate. Guthrie testified that she was confident that J.S. would be assaulted; Powell testified about Victor Zipp's tendency to walk naked in the cell; and Nurse Cook testified that it was almost "animalistic" in 26 Hallway. A reasonable fact-finder could conclude that Freeman was aware of the objective risk of harm in placing J.S. in 26 Hallway.

Defendants took affirmative steps to place J.S. in harm and thus violated both statutes. Accordingly, their convictions are **AFFIRMED**.

b. The Cover-up

Lanham and Freeman also challenge their convictions for unlawfully falsifying their records in violation of 18 U.S.C. § 1519, which states "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . shall be fined under this title, imprisoned not more

than 20 years, or both." Lanham argues that his incident report was not false because his supervisor, Sydnor, testified that the detox cells were in fact contaminated that night, and that there is a difference between a false statement and an omission. He claims that his report simply omitted information rather than affirmatively made false statements.

Sydnor testified that the detox cells "had an odor coming from them," but further stated that the odor would not "by itself" be a justification for moving J.S., and that the other inmate in the same detox cell was not moved that night. (R. 92, Tr. at 15.) This contradicted Lanham's written report, which claims that Sydnor "stated that he was going to start emptying our detox to get them cleaned." (Appellee's App. at 33.) Lanham also wrote that he went to 26 Hallway to speak to Wright about being reclassified. The evidence showed that Lanham went to 26 Hallway to tell Wright to "f-ck with" J.S. Lanham himself admitted on cross-examination that his report was "inaccurate." (R. 87, Tr. at 19.) Sydnor testified that he told Lanham and Freeman that they should report that the detox cells needed to be decontaminated *after* learning that J.S. was raped in Cell 101. This is sufficient evidence for a rational fact-finder to find that Lanham intentionally falsified his reports.

Freeman argues that his report contained omissions of fact rather than affirmative lies. Freeman wrote that he and Lanham went to some prisoners in 26 Hallway and then returned "to Class D . . . [and] went to 26 Hall [and] did a secure check for Sgt. Sydnor." (Appellee's App. at 32.) These statements were false. In fact, Freeman returned to booking after talking with Wright, rather than proceeding

immediately to Class D as stated in the written report. Material omissions of fact can be interpreted as an attempt to "cover up" or "conceal" information. A reasonable fact-finder could conclude that Freeman falsified his report.

Lanham also argues that there had to be an ongoing or imminent federal investigation at the time the reports were written to meet the requirements of the statute. The language in 18 U.S.C. § 1519 clearly states that the falsification could be done "in relation to or contemplation of any" investigation or matter within United States jurisdiction. The conspiracy to harm J.S. was within the jurisdiction of the United States, and the falsification was presumably done in contemplation of an investigation that might occur. A reasonable fact-finder could find that Sydnor warned Lanham and Freeman that they had to get their stories straight in anticipation of an investigation of J.S.'s rape.

For the aforementioned reasons, the convictions for falsification of records are **AFFIRMED**.

c. Sexual Assault Enhancement under 18 U.S.C. §§ 241, 242

Defendants were charged under 18 U.S.C. § 241 for conspiring to violate J.S.'s civil rights. The indictment charged that the acts in furtherance of the conspiracy included aggravated sexual abuse. The statute establishes a ten year maximum sentence for those convicted under the statute, and includes an increased penalty of "any term of years or for life," if the conspiracy included an act of "aggravated sexual abuse." Because the question of whether an act of

sexual abuse occurred is a factual issue that "increases the penalty" for the violation of 18 U.S.C. § 241 "beyond the prescribed statutory maximum," the question was required to be "submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The district court properly submitted the question of whether aggravated sexual abuse occurred to the jury, adopting the definition of aggravated sexual abuse found in 18 U.S.C. § 2241 (1998).

Defendants' argument that their conduct had to meet the jurisdictional requirements of aggravated sexual abuse in 18 U.S.C. § 2241, which require that the abuse occurred in a federal prison, is without merit. They were not charged under that statute, and the district court was merely giving content to the term "aggravated sexual assault" by using the definition in 18 U.S.C. § 2241. The jurisdictional requirements of 18 U.S.C. § 2241 did not apply because they were not prosecuted under this statute. Accordingly, the sexual assault enhancement is **AFFIRMED**.

4. Mitigating Role Adjustment to Freeman's Sentence

This Court reviews a "district court's denial of a mitigating role adjustment to a defendant's offense level for clear error." *Salgado*, 250 F.3d at 458. "To be clearly erroneous, . . . a decision must strike [this Court] as more than just maybe or probably wrong; it must strike us as wrong with the force a five-week-old, unrefrigerated dead fish." *United States v. Perry*, 908 F.2d 56, 58 (6th Cir. 1990) (internal citations, quotations, and alterations omitted).

U.S.S.G. § 3B1.2(b) directs courts to reduce a defendant's offense level by two levels where defendant "was a minor participant in any criminal activity." This Court has held, "[t]he 'minor participant' reduction is available only to a party who is 'less culpable than most other participants' and 'substantially less culpable than the average participant.'" *United States v. Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993) (quoting U.S.S.G. § 3B1.2, cmt. n.3). The district court rejected the role reduction for Freeman, stating: "While he did not have as much of a speaking role, his activities, first his knowledge of what was going on and his participation in the agreement of defendants was substantial. He added weight to Mr. Lanham's statements and, as indicated during trial, he indicated agreement with the activities that were being requested by Mr. Lanham. And under those circumstances, the Court believes it would be improper to reduce his role as a minor or minimal participant." (R. 142, Tr. at 9.) Freeman's actions were deliberately indifferent, and after the rape he was an active participant in the coverup of the crime. The district court's findings were not clearly erroneous. Accordingly, Freeman's sentence is **AFFIRMED**.

5. Freeman's *Brady* Motion

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the government is required "to disclose exculpatory and impeachment evidence that is 'material either to guilt or to punishment.'" *Doan v. Carter*, 548 F.3d 449, 459 (6th Cir. 2008) (quoting *Strickler v. Greene*, 527 U.S. 263, 280 (1999)). "A *Brady* violation includes three elements: (1) the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been

suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Id.* Evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of proceeding would have been different." *Id.*(internal citation and quotations omitted).

Freeman argues that the government "did not disclose to [the] defense that Chandler had told them that the video depicted Shawn Freeman at a cell other than Cell 101," and the "FBI was aware of this information and failed to disclose it." (Appellant Freeman's Second Br. at 57.) This evidence presumably would have shown that Freeman was not present when Lanham approached Wright about J.S. Assuming, *arguendo*, that this evidence was deliberately or inadvertently withheld, Freeman is unable to show that he was prejudiced by such withholding.

Inmate Wright testified that Freeman was with Lanham, and that Freeman nodded his head in agreement with Lanham's statements. Freeman himself corroborated Wright's testimony that he shook his head while Lanham asked Wright to "f-ck with" J.S. Whether Freeman was standing in Cell 98 or 99, or 96 as Chandler originally stated, is immaterial when there is significant corroboration of Wright's testimony that Freeman was there nodding his head when Lanham was telling Wright to "f-ck with" J.S. Accordingly, there was no prejudice, and the district court properly held that no *Brady* violation occurred. As such, the district court's determination is **AFFIRMED**.

6. Applicable Sentencing Guidelines

The sentencing court is to apply the version of the Sentencing Guidelines in effect at the time of sentencing unless it "determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause." U.S.S.G. § 1B1.11(b)(1).

Defendants committed their offenses in 2003 when the 2002 Guidelines were in effect at the time of the crime. The 2008 Guidelines, in effect at time of sentencing, establish a higher base offense level for the offense of Criminal Sexual Abuse. The government argues that using the 2008 advisory Guidelines, which established a more onerous offense level than that in effect on the date of crime, would not violate the Ex Post Facto Clause under the new post-*Booker* advisory Guidelines regime. The Ex Post Facto Clause "bars application of a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Johnson v. United States*, 529 U.S. 694, 699 (2000) (internal citations and quotations omitted).

The Supreme Court has interpreted the Ex Post Facto Clause to bar retroactive application of a revised version of a state's sentencing guidelines, *Miller v. Florida*, 482 U.S. 423 (1987), and this Court applied that decision to the federal Sentencing Guidelines, see *United States v. Kussmaul*, 987 F.2d 345, 351-52 (6th Cir. 1993). The government argues that this legal precedent no longer applies because, post-*Booker*, the Sentencing Guidelines are advisory rather than mandatory. Although this Court has not directly determined whether the now advisory Guidelines

regime implicates Ex Post Facto concerns, there is some case law in support of holding that it does. This Court has acknowledged that "[t]he presence of discretion does not displace the protections of the Ex Post Facto clause." *Michael v. Ghee*, 498 F.3d 372, 382 (6th Cir. 2007). When evaluating the reasonableness of a sentence, the reviewing court must consider the applicable Guidelines range and failure to do so is "reversible error." *See United States v. Kosinski*, 480 F.3d 769, 779 (6th Cir. 2007). The Sentencing Guidelines are still relevant and are a starting point for determining a defendant's sentence. Only when the Guidelines range is unable to meet the goals of the Sentencing Guidelines is a sentencing court expected to vary from the Guidelines sentence. 18 U.S.C. § 3553(a). As a result, the advisory nature of Guidelines does not completely eliminate Ex Post Facto concerns. Ironically, the government is presumably interested in having the 2008 Guidelines apply because it would impact Defendants' sentence, which demonstrates the Ex Post Facto concerns that come into play when retroactively applying the 2008 Guidelines. Accordingly, the district court's determination is **AFFIRMED**.

7. Leader or Organizer Enhancement to Lanham's Sentence

When a "defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the offense level is increased by four levels. U.S.S.G. § 3B1.1(a). The Sentencing Guidelines direct the court to consider facts such as "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of

accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1, cmt n.4.

The district court stated that it would not apply the enhancement because "[u]nder the facts of this particular case, it would not appear that the initial idea for the punishment of victim was Mr. Lanham's idea." (R. 143, Tr. at 10.) The government argues that the district court committed legal error in overemphasizing the fact that Lanham did not originate the conspiracy. However, this fact is significant in assessing his "exercise of decision making authority,"the "nature of [his] participation in the commission of the offense," "the degree of participation in planning or organizing the offense," and "the degree of control and authority exercised over others." U.S.S.G. § 3B1.1, cmt n.4.

The district court stated that "looking at all participants in the case and the instructions that were given, the Court believes that while it is a close question, the Court will not apply an adjustment for role in the offense based on the facts that are presented." (R. 143, Tr. at 10-11.) The district court did not commit legal error in holding that Lanham did not act as an organizer. Lanham exercised limited decision-making authority, did not originate the plan, did not actively participate in bringing J.S. to Cell 101, and did not exercise control over the other jailers in ensuring that the plan was exercised. Under these facts, the district court's determination was not a legal

error and the decision to deny the enhancement is **AFFIRMED**.

III. CONCLUSION

For the foregoing reasons, Defendants' convictions and sentences are **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 08-6504; 08-6506; 09-5094; 09-5095

[Filed August 24, 2010]

UNITED STATES OF AMERICA,	)
Plaintiff - Appellee/	)
Cross-Appellant (09-5094/5095),	)
	)
v.	)
	)
WESLEY LANHAM (08-6504; 09-5094);	)
SHAWN FREEMAN (08-6506; 09-5095),	)
Defendants - Appellants/	)
Cross-Appellees.	)
	)

Before: KEITH, BOGGS, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Kentucky at Covington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the convictions and sentences of defendants Wesley Lanham and Shawn Freeman are AFFIRMED in their entirety.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX B

AO 245B (Rev. 06/05) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION

Case Number: 2:08-CR-5-DCR-3
USM Number: 11777-032

[Filed December 10, 2008]

UNITED STATES OF AMERICA	)
	)
V.	)
	)
SHAWN FREEMAN	)
	)

JUDGMENT IN A CRIMINAL CASE

C. Ed Massey & Randy Blankenship
Defendant's Attorney

THE DEFENDANT:

* * *

X was found guilty on count(s) ONE, TWO & SIX OF INDICTMENT after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:241	Conspiracy	02/14/03	1
18:242 and 2	Aiding & Abetting Civil Rights Violation	02/14/03	2
18:1519	Aiding & Abetting Falsification of Records	02/14/03	6

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as amended or modified by the Supreme Court's January 12, 2005 decision in *United States v. Booker* and *United States v. Fanfan*.

* * *

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in the economic circumstances.

December 8, 2008
Date of Imposition of Judgment

/s/ Danny C. Reeves
Signature of Judge

DANNY C. REEVES
U. S. DISTRICT JUDGE
Name and Title of Judge

DECEMBER 10, 2008
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One Hundred Sixty Eight (168) months on Count One and Six, and 120 months on Count Two, to be served concurrently with each other, fora total term of 168 months.

X The court makes the following recommendations to the Bureau of Prisons:

The court recommends that defendant be designated to a facility closest to his home (Irvine, Kentucky) for which he qualifies.

* * *

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 2 p.m. on January 5, 2009

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Three (3) years on each of Counts One, two, and Six, to be served concurrently with each other, for a total term of Three (3) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable.)

* * *

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation

officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special

agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall perform 150 hours of community service as directed by the probation officer.

* * *

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS:	$ 300.00	$ Waived	$ N/A

* * *

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant

to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$0	$0	

* * *

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $300.00 due immediately, balance due

* * *

X in accordance

* * *

X F below;

* * *

F X Special instructions regarding the payment of criminal monetary penalties:

$300.00 Special Assessment due and payable immediately Payments to be made to:

U.S. District Court Clerk
P.O Box 1073
Covington, KY 41012-1073

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 08-6504/6506/09-5094/5095

[Filed September 29, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee/ Cross-Appellant (09-5094/5095),	)
	)
v.	)
	)
WESLEY LANHAM, (08-6504/09-5094), SHAWN FREEMAN, (08-6505/09-5095),	)
	)
Defendants-Appellants/ Cross-Appellees.	)
	)

ORDER

BEFORE: KEITH, BOGGS, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX D

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from

the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

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(2)

APR 6 - 2011
OFFICE OF THE CLERK

No. 10-872

In the Supreme Court of the United States

SHAWN FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
THOMAS E. PEREZ
Assistant Attorney General
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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court's failure to remove two jurors for cause was harmless error when petitioner later removed those jurors with peremptory challenges.

2. Whether the court of appeals correctly held that the district court did not commit plain error when it limited questioning concerning the possible length of a government cooperator's sentence.

3. Whether the court of appeals correctly held that a pretrial detainee has a clearly established constitutional right not to be deprived of liberty without due process of law.

4. Whether the court of appeals correctly held that the evidence was sufficient to support petitioner's conviction for violating 18 U.S.C. 241.

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In the Supreme Court of the United States

No. 10-872

SHAWN FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 617 F.3d 873.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2010. A petition for rehearing was denied on September 29, 2010 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on December 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on (1) one count of conspiring to injure, oppress, threaten, or intimidate any person in the free

exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, in violation of 18 U.S.C. 241; (2) one count of depriving another of rights under color of law, in violation of 18 U.S.C. 242 and 2; and (3) one count of knowingly falsifying a document with the intent to impede, obstruct, or influence the investigation or proper administration of the matter that was the subject of the document, in violation of 18 U.S.C. 1519. Pet. App. 32a-33a. He was sentenced to 168 months of imprisonment, to be followed by three years of supervised release. *Id.* at 10a, 35a. The court of appeals affirmed. *Id.* at 1a-31a.

1. a. In the early morning hours of February 14, 2003, petitioner was working as a corrections officer at the Grant County Detention Center (Detention Center). Pet. App. 3a. On duty with him were several other officers, including Shawn Sydnor and Wesley Lanham. *Ibid.* An 18 year-old man named Joshua Sester was brought to the Detention Center that night after being arrested for speeding and eluding the police. *Ibid.*; Gov't C.A. Br. 8. The deputy sheriff who brought Sester to the Detention Center told Sydnor that Sester's car had almost hit an off-duty officer who was Sydnor's friend. Pet. App. 3a. Sester was six feet tall, but weighed only 125 pounds. *Ibid.* He had blond highlights in his hair, wore a bright shirt, and had hearts on his boxer shorts. *Ibid.*

When Sester arrived, Sydnor called other officers, including petitioner, to come to the booking area to look at Sester's hair. Pet. App. 3a. While they were booking Sester, petitioner and other officers teased and laughed at Sester. *Id.* at 3a-4a. The officers told Sester that he looked "like a girl" and a "sissy," and they made fun of his highlighted hair and boxer shorts. *Id.* at 4a. Sydnor

told Sester that he was "cute" and testified that he heard someone tell Sester that he would make a "good girlfriend for the inmates." *Ibid.* Another officer asked Sester "what he was thinking, wearing silk heart shaped boxers in jail on Valentines Day." *Ibid.*

The Detention Center includes separate sections for housing different types of people who are in custody. The Center's standard operating procedure was to house pretrial detainees such as Sester in a detox cell near the booking area. Gov't C.A. Br. 7. General-population prisoners were housed in other areas of the Center, including an area known as 26 Hallway. *Ibid.* The Center had a policy of not housing people who had been arrested for traffic violations—such as Sester—with general-population prisoners. *Ibid.*

In spite of those standard practices, Sydnor told petitioner and Lanham that Sester "needed to be scared" and asked them to find a cell in the general population area for Sester. Pet. App. 4a. In response, Lanham stated (in petitioner's presence) that he "knew a guy"—inmate Bobby Wright—who was housed in Cell 101 "down in 26 Hall." *Ibid.* The inmates housed in 26 Hallway included those convicted of misdemeanors and felonies, and it was commonly known as the "hallway from hell." *Ibid.* A nurse who worked at the Detention Center testified that the inmates housed on 26 Hallway were "almost * * * animalistic." *Ibid.* Twenty-six Hallway had more incidents of sexually predatory behavior among inmates than other areas of the Detention Center, and the Center's staff was aware that 26 Hallway had a reputation for violence. *Ibid.*

Cell 101, which is located in 26 Hallway, housed prisoners who had been convicted of felony offenses. Pet. App. 4a. On the night in question, 12-14 inmates occu-

pied Cell 101. *Ibid.* One of those inmates was Victor Zipp, who was known to be intimidating. *Id.* at 5a. Zipp was often naked and guards had to repeatedly tell him to put his clothes back on. *Ibid.* After Lanham volunteered that he knew an inmate in Cell 101, he and the petitioner went to the cell and spoke with inmate Wright. *Id.* at 5a. Lanham and petitioner told Wright they were going to bring Sester down to Cell 101, and Lanham told Wright they wanted the inmates to "fuck with" Sester. *Ibid.* Petitioner nodded his head as Lanham spoke. *Ibid.* The other inmates standing close to the door reacted with celebration. *Ibid.* Inmates in 26 Hallway were "pretty rowdy" that night in part because earlier they had beaten up an inmate who then had to be removed from the cell by officers including petitioner. *Ibid.* Wright testified that the inmates "were looking for anything to go down again." *Ibid.*

When petitioner and Lanham returned to the booking area, Lanham told Sydnor that he had spoken to Wright and that everything would be "taken care of." Pet. App. 6a. Sydnor and another officer then escorted Sester to Cell 101 in 26 Hallway, where three or four inmates were waiting at the door. *Ibid.* Sester was crying and heard an inmate call out: "Oh, it's Valentine's Day, bring him here. He'd make a good girlfriend." *Ibid.* Other inmates made comments such as: "He's so pretty, bring him in here. We've got a nice spot for him." *Ibid.* Sester testified that he heard one of the guards say: "Here you go boys. I got some fresh meat for you." *Ibid.* A guard pushed Sester into the cell and closed the door. *Ibid.*

When Sester was inside the locked Cell 101, an inmate grabbed him around the arm and led him over to a bed, where inmates stripped off his clothes and slapped

him before taking him into the cell's shower area. Pet. App. 6a. Sester called out for help numerous times, but no one responded. *Ibid.* In the shower area, the inmates threw Sester against the wall in the corner, turned on scalding hot water, and started beating his head against the wall. *Ibid.* Sester then felt a strong pain in his buttocks and believed he was being anally raped. *Ibid.* Eventually, Sester got out of the shower and tried to run towards the door, but he fell on the floor. *Ibid.* Zipp emerged from the shower area naked and told Sester that he would have to submit to either anal or oral sex. *Id.* at 6a-7a. Sester stated he did not want to do either and said no several times. *Id.* at 7a. Zipp then forced Sester to perform oral sex on him until Sester bit down as hard as he could and Zipp withdrew. *Ibid.* After another inmate punched Sester in the head, Sester was left alone. *Ibid.* The guards left Sester in Cell 101 all night without checking on him once. *Ibid.* In the morning, Sester was brought to pretrial services, where he saw the Detention Center's nurse and told her that he "had been traumatized and he had been raped and he had been abused all night long." *Ibid.*

b. During the shift beginning the following night, petitioner and the other officers learned that Sester had been raped and beaten in the cell. Pet. App. 8a. Sydnor fabricated a story to explain the officers' placing Sester in Cell 101. *Ibid.* Sydnor told petitioner and Lanham to say that they moved Sester to a general population cell because the officers needed to decontaminate the detox cells where Sester would otherwise have been placed. *Ibid.* Sydnor also told petitioner and Lanham that they needed to get their stories straight about the previous shift because they all "were in a lot of trouble." *Ibid.* Several officers, including petitioner, filed reports con-

taining false information about the events in question. *Id.* at 8a-9a. Petitioner falsely stated in a report that he and Lanham had passed through 26 Hallway at some point to do a security check. *Id.* at 9a.

2. On January 24, 2008, a federal grand jury returned a seven-count indictment against petitioner, Sydnor, and Lanham. Gov't C.A. Br. 3. The indictment charged petitioner with three counts. First, petitioner was charged with conspiring to injure, oppress, threaten, and intimidate Sester by denying his right not to be deprived of liberty without due process of law, in violation of 18 U.S.C. 241. Gov't C.A. Br. 3-4. The indictment further alleged that the acts committed in furtherance of the conspiracy included aggravated sexual assault. *Id.* at 4. Second, petitioner was charged with depriving Sester of liberty without due process of law, while acting under color of law, by locking Sester into Cell 101, in violation of 18 U.S.C. 242 and 2. *Ibid.* The indictment further alleges that petitioner acted with deliberate indifference to a substantial risk that inmates in that cell would physically assault and otherwise harm Sester, and that the offense resulted in bodily injury to Sester. *Ibid.* Third, petitioner was charged with knowingly falsifying an official report concerning the placement of Sester into Cell 101 with the intent to impede, obstruct, and influence the investigation and proper administration of that matter, in violation of 18 U.S.C. 1519. Gov't C.A. Br. 4-5.

Before trial, Sydnor pleaded guilty and agreed to testify against petitioner and Lanham. Pet. App. 9a. On August 14, 2008, the jury convicted petitioner on all three counts against him. Gov't C.A. Br. 5. Petitioner was sentenced to 168 months of imprisonment, to be

followed by three years of supervised release. Pet. App. 10a, 35a.

3. The court of appeals affirmed. Pet. App. 1a-31a. The court first considered petitioner's argument that he was entitled to a new trial because the district court had abused its discretion in failing to strike two jurors for cause when the jurors expressed doubt about their ability to put aside news reports they had read about the case. *Id.* at 11a. The court of appeals agreed that the district court's failure to strike those jurors for cause was an abuse of discretion, but declined to overturn petitioner's conviction because petitioner failed to demonstrate that he suffered any harm as a result of the district court's error. *Id.* at 11a-13a. The court of appeals found no harm because petitioner and his co-defendant had removed the jurors through the use of peremptory challenges. *Id.* at 12a-13a.

The court of appeals also rejected petitioner's argument that the district court committed plain error in limiting cross-examination of Sydnor, who pleaded guilty before trial and testified against petitioner and Lanham. Pet. App. 13a-16a. When Sydnor testified, the district court instructed defense counsel that, although they could ask Sydnor about his entering a guilty plea with the hope of receiving a shorter sentence, they could not ask questions about the actual length of sentence Sydnor hoped to receive in exchange for cooperating with the government. *Id.* at 13a-14a. Because petitioner did not object to that limitation in the district court, the court of appeals reviewed his challenge under the plain-error standard. *Id.* at 15a. The court noted that there was a "circuit split on the issue of whether defendants should be prohibited from asking cooperating witnesses, and former co-conspirators, details about their sen-

tences and sentencing agreements with the government to expose the witnesses' bias." *Ibid.* In light of the existence of "conflicting authorities," the court held, "the district court could not have committed plain error." *Ibid.*

Finally, the court of appeals rejected petitioner's argument that there was insufficient evidence to convict him of conspiring to violate Sester's rights and of violating Sester's rights under color of law. Pet. App. 16a-20a. The court noted that this Court has held that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Id.* at 17a (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994)). As the court of appeals explained, "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective.'" *Ibid.* (quoting *Farmer*, 511 U.S. at 833). The court further noted that a "prison official can be found guilty where 'the official knows of and disregards an excessive risk to inmate health and of safety.'" *Id.* at 17a-18a (quoting *Ford* v. *County of Grand Traverse*, 535 F.3d 483, 495 (6th Cir. 2008)).

In light of those legal principles, the court of appeals concluded that there was sufficient evidence upon which to convict petitioner of "the relevant statutes." Pet. App. 19a-20a. The court explained that petitioner "taunted [Sester], joined Lanham in taking action to solicit inmates to harm [Sester], failed to check on [Sester] throughout the five hours he was in Cell 101, and then joined in the cover up of his assault." *Id.* at 19a. The court thus held that the jury had a sufficient basis to conclude that petitioner intentionally joined the conspiracy to place Sester "in a general population cell

to 'scare' him" and that petitioner "failed to protect or assist [Sester] after learning of the plan." *Ibid.*

ARGUMENT

Petitioner repeats his arguments that his conviction should be reversed because the district court erred in failing to excuse two jurors for cause, because the district court erroneously restricted petitioner's ability to cross-examine a cooperating co-conspirator, and because there was insufficient evidence to convict petitioner of violating or conspiring to violate Sester's clearly established rights. The court of appeals correctly rejected each of petitioner's arguments and there is no conflict between the court of appeals' decision and any decision from this Court or from any other court of appeals that warrants review by this Court.

1. Petitioner first argues (Pet. 11-16) that the district court's refusal to strike two jurors for cause at the request of petitioner and his co-defendant, combined with the court's agreeing to strike a third juror for cause at the request of the government, violated his rights under the Due Process Clause. His argument is without merit.

The court of appeals found that the district court abused its discretion by failing to strike Jurors 56 and 143 for cause after they expressed doubt that they could be impartial. Pet. App. 11a-12a. The court correctly concluded, however, that such an error did not warrant reversal of petitioner's conviction because petitioner and his co-defendant had removed those jurors through the use of peremptory challenges. *Id.* at 12a-13a. As the court of appeals noted, *id.* at 12a, this Court held in *United States* v. *Martinez-Salazar*, 528 U.S. 304, 307 (2000), that, when a defendant "elects to cure" an erro-

neous refusal to strike a juror for cause "by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." There is no reason for this Court to review the court of appeals' straightforward application of that holding to petitioner's case.

Nor does the district court's removal of a potential juror for cause at the request of the government change the proper application of the rule announced in *Martinez-Salazar*. The court correctly struck that juror because of the juror's long-term professional relationship with one of the defense attorneys. Petitioner suggests (Pet. 14) that the district court "deliberately misapplied the law in order to force [petitioner] to use a peremptory challenge to correct the court's error," 528 U.S. at 316, by applying one standard to defendants' motions to strike for cause and another to the government's motions to strike for cause. But that contention finds no support in the record. The reasons given for seeking the removal of the jurors in question were not the same. Petitioner sought the removal of jurors who expressed doubts about their ability to judge impartially but who ultimately stated that they believed they could; the government sought (and obtained) the removal of a juror whose professional relationship to defense counsel on its face called into question her impartiality. See Pet. App. 10a-13a. The district court's different conclusions about whether to strike the jurors in question does not suggest that it applied a different standard to motions to strike for cause from petitioner than to such motions from the government. Nor does petitioner offer any support for his suggestion (Pet. 14) that the district court "deliberate[ly] misappli[ed]" the law.

Petitioner also cannot establish that he suffered any harm as a result of the district court's refusal to strike for cause two jurors whom petitioner then removed with peremptory challenges. Although he complains (Pet. 15) that he was forced to choose between allowing two potentially biased jurors to sit on the jury and using peremptory challenges to remove them, this Court held in *Martinez-Salazar* that such a choice does not amount to a violation of any constitutional or rule-based right. 528 U.S. at 310-317; *id.* at 315 ("A hard choice is not the same as no choice."). Petitioner does not even attempt to explain how he would have used his strikes differently, on what basis he would have done so, or how different choices would have affected the verdict. Petitioner and his co-defendant received all of the peremptory challenges they allowed under Federal Rule of Criminal Procedure 24(b)(2) and petitioner does not even allege that he had to use all of his peremptory challenges in order to keep Jurors 56 and 143 from sitting on his jury. Nor has petitioner ever claimed that the district court's error resulted in the seating of a biased or otherwise unqualified juror. See *Martinez-Salazar*, 528 U.S. at 307 (peremptory challenges "are not of constitutional dimension" but are "one means to achieve the constitutionally required end of an impartial jury").

Finally, petitioner does not assert that his case implicates a division of authority among the courts of appeals. Although he purports to rely (Pet. 13) on the Sixth Circuit's decision in *Wolfe* v. *Brigano*, 232 F.3d 499 (2000), the court of appeals correctly concluded that that decision is inapposite because the jury empaneled in that case included four biased jurors who actually participated in the trial. Pet. App. 13a. Further review of the

court of appeals' correct application of this Court's binding precedent is not warranted.

2. Petitioner asserts (Pet. 16-22) that the Confrontation Clause prohibits district courts from limiting a defendant's cross-examination of a cooperating witness about the magnitude of the sentence reduction he received as a result of his cooperation. Because petitioner failed to raise this argument before the district court, the court of appeals properly reviewed it under the plain-error standard. To prevail on plain-error review, petitioner would have to show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (citation omitted); see, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Petitioner cannot make that showing because no error was committed in this case. In addition, even if there were error, it was neither "clear" nor "obvious." Cf. *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error when there is no controlling case law and circuits are split); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006). Although there is some disagreement in the courts of appeals about this question, petitioner overstates the extent of those differences. Petitioner cannot establish that he suffered prejudice as a result of the district court's ruling and has not even attempted to establish the existence of any error that seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

a. The court of appeals correctly held that the district court's restriction of petitioner's ability to question Sydnor about the length of sentence he expected to face did not constitute plain error. As this Court has found, "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-679 (1986). This Court has recognized, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679.

In this case, the district court limited questioning on the length of the sentence Sydnor hoped to receive in exchange for his cooperation or the length of the sentence he might have been subjected to if he had proceeded to trial and been convicted. 8/11/2008 Tr. 7-8. But the court made clear that "the parties would be able to certainly ask questions about the defendant entering a plea [of] guilty in exchange for hoping to receive a lesser punishment." Pet. App. 14a. The court also made clear that its imposition of the limitation in question was intended to prevent the jury from learning about the potential length of sentence petitioner and his co-defendant faced if convicted. Tr. 7-8.

The district court's ruling was a permissible exercise of its discretion. The information that petitioner sought to elicit was highly prejudicial because petitioner himself was charged with many of the same crimes that Sydnor had originally been charged with before agreeing to plead guilty. Permitting cross-examination about

the potential sentences associated with those charges would have informed the jury of the sentences that would have followed if petitioner were convicted, thereby creating a significant risk of prejudice to the government. See *Shannon* v. *United States*, 512 U.S. 573, 579 (1994) ("[P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."); Tr. 7-8 ("Of course, it's proper to ask if a witness anticipates that he'll receive a lesser penalty as a result of entering a plea of guilty, but, again, it is the province of the Court to impose penalties."). Counsel for petitioner and his co-defendant were permitted to probe into Sydnor's potential biases, his hopes for a considerable reduction in his sentence based on his cooperation and testimony, his dismissed charges, or the timing of his plea agreement—and they did so. See Gov't C.A. Br. 34-35. In addition, the district court properly instructed the jury to consider Sydnor's testimony with caution and care, and counsel for petitioner and his co-defendant argued in closing that Sydnor had strong motivation to lie in order to gain a reduced sentence. *Id.* at 35. The district court reasonably balanced the risk of prejudice against the limited probative value of the evidence in deciding to limit petitioner's questioning. The court's fact-intensive exercise of discretion does not warrant this Court's review.

b. Even if the district court did err in restricting petitioner's ability to question Sydnor about the length of sentence he expected to face, compared to the length of sentence he could have faced if he had not cooperated, any error was not plain. As petitioner notes (Pet. 19-22), different courts of appeals have reached different con-

clusions about whether it was appropriate for a district court in a particular case to limit a defendant's ability to cross-examine a cooperating witness about the magnitude of the sentence reduction he hoped to receive by testifying. Compare *United States* v. *Arocho*, 305 F.3d 627, 636 (7th Cir. 2002) (upholding limitation on questions concerning the specific sentences and sentencing guidelines the cooperators faced because the defendants "were able to elicit sufficient information to allow the jury to assess" the cooperators' "credibility, motives and bias"); *United States* v. *Cropp*, 127 F.3d 354, 358 (4th Cir. 1997) (upholding district court's ruling "that the defense could not ask about the specific penalties that the cooperators would have received absent cooperation, or about the specific penalties they hoped to receive due to their cooperation"), cert. denied, 522 U.S. 1098 (1998); *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995) (upholding limitation on question about the number of years cooperator would have faced on dismissed charge when cooperator was asked "repeatedly whether he had received any benefit for his testimony"); with *United States* v. *Chandler*, 326 F.3d 210, 221 (3d Cir. 2003) (limitation was error because "the jury might have 'received a significantly different impression of [witnesses'] credibility'"); *United States* v. *Roan Eagle*, 867 F.2d 436, 443-444 (8th Cir.) (noting that inquiry into the terms of a cooperating defendant's plea agreement "is essential" to effective cross-examination, but finding error to be harmless because the cooperating witness's credibility "was not really an issue"), cert. denied, 490 U.S. 1028 (1989).

In light of the arguably different results that have arisen from courts of appeals' fact-bound resolution of particular claims, the court of appeals correctly held

that any error was not sufficiently obvious to satisfy the plain-error standard. Whether a particular limitation on cross-examination constitutes error depends on case-specific questions such as the degree to which the defendant was otherwise permitted to inquire about a witness's plea agreement, the importance of the witness, and the extent to which the witness's credibility was at issue. District courts cannot be held to have committed obvious error when different courts of appeals may weigh those facts differently. And a case that reaches this Court on plain-error review would not be a suitable vehicle for this Court to use in order to clarify the law.

c. Even assuming that the district court's decision to restrict cross-examination were plainly erroneous, petitioner did not suffer any prejudice as a result. The district court accorded petitioner ample latitude to explore Sydnor's possible motives and biases, giving petitioner and his co-defendant more than adequate opportunity to thoroughly impeach Sydnor's testimony. Cf. *United States* v. *Hoyte*, 51 F.3d 1239, 1243 (4th Cir.) (finding a lack of prejudice from the failure to disclose a witness's prior inconsistent statement, because the witness "was impeached in so many other ways"), cert. denied, 516 U.S. 935 (1995). In addition, because Sydnor's testimony was corroborated by testimony of other witnesses (including the victim, an inmate, and other detention officers), thereby independently establishing petitioner's guilt, any error was harmless. See Gov't C.A. Br. 5-17.

d. Finally, petitioner makes no effort to establish that the alleged error substantially impaired the fairness, integrity, or public reputation of judicial proceedings. Indeed, the petition does not even mention the plain-error standard. Further review is not warranted.

3. Petitioner also argues (Pet. 23-31) that his conviction for violating 18 U.S.C. 242 by depriving Sester of his rights under color of law must be overturned because the constitutional right of a pretrial detainee to be free from punishment (including violence at the hands of other inmates) was not "established with sufficient clarity." The court of appeals correctly rejected that argument and that decision does not warrant review by this Court.

As the court of appeals noted, prison officials "have a duty . . . to protect prisoners from violence at the hands of other prisoners"; officers may not simply allow "nature [to] take its course." Pet. App. 17a (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994)). The court of appeals correctly relied on this Court's statement in *Farmer* that "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective.'" *Ibid.* (quoting *Farmer*, 511 U.S. at 833). Thus, a prison official violates an inmate's rights when "the official knows of and disregards an excessive risk to inmate health or safety." *Terrance* v. *Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir. 2002) (quoting *Farmer*, 511 U.S. at 837). This Court has also held that punishment of a pretrial detainee (such as Sester) is not a legitimate penological purpose under the Fourteenth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979).

Given the clear holdings of this Court and the Sixth Circuit that a pretrial detainee may not be subject to punishment of any kind and that a prison guard may not display deliberate indifference to the risk that an inmate will be injured at the hands of other inmates, petitioner was on notice of the constitutionally suspect nature of his actions. Petitioner does not even suggest that the

courts of appeals disagree about whether such a constitutional right is established. To the extent that petitioner's argument boils down to a claim that the government did not present sufficient evidence that petitioner did in fact intend to punish Sester or that he was in fact deliberately indifferent to the risk of harm Sester faced, that fact-bound issue does not warrant review by this Court. In any case, the government presented ample evidence that petitioner did violate Sester's rights while acting under color of law. Pet. App. 19a. For example, the evidence established that petitioner actively took steps to allow inmates to punish and harm Sester. See Gov't C.A. Br. 10-12. The evidence also established that petitioner was aware of the substantial risk of harm to Sester in Cell 101 and of his responsibilities in light of that risk. See *id.* at 6-7, 10-11, 16-17.

4. Finally, petitioner argues (Pet. 32-36) that the evidence presented at trial was not sufficient to establish that he conspired with other guards to deprive Sester of his rights, in violation of 18 U.S.C. 241. Petitioner is incorrect. The evidence showed that petitioner taunted Sester, joined with Lanham in taking action to solicit inmates to harm Sester, failed to check on Sester throughout the five hours he was in Cell 101, and then joined in the cover-up after the rape and beating. See Gov't C.A. Br. 12, 15, 18-19. Sydnor testified that he told both petitioner and Lanham of his plan to scare Sester and that petitioner did not object to the plan. See *id.* at 10. Corrections Officer Wendy Guthrie also testified that petitioner was present during the discussion of the plan to scare Sester. See *ibid.* In addition, inmate Wright testified that petitioner and Lanham came to the door of Cell 101 and spoke with him. See *id.* at 12. Wright testified that, when Lanham told Wright that

they wanted Wright to "fuck with" Sester, petitioner was standing at the door nodding his head. See *ibid.*

In any case, review by this Court of the fact-bound issue of whether there was sufficient evidence to prove that petitioner was involved in the conspiracy is not warranted. See Sup. Ct. R. 10; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Petitioner does not allege that his sufficiency claim implicates any broader legal principle and does not identify any disagreement between the court of appeals' decision and any decision of this Court or any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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